APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

THE STATE OF GEORGIA, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Jurisdictional Statement Filed July 14, 1972
Probable Jurisdiction Noted October 16, 1972

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IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and member of the State Election Board; WILLIAM E. BLANKS, M. M. SMITH, MATTHEW PATTON, MELBA WILLIAMS, Members; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE, CHARLES H. KIRBO, Chairman; THE STATE REPUBLICAN EXECUTIVE COMMITTEE, ROBERT J. SHAW, Chairman,

Defendants.

CIVIL ACTION NO. 16373

COMPLAINT

[Filed March 27, 1972]

[R. 4]

The United States of America, plaintiff herein, alleges:

1. This action is brought by the Acting Attorney General on behalf of the United States pursuant to Section 5 and Section 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973c and 1973j(d), and in order to secure rights

guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and Section 12(f) of the Voting Rights Act of 1965, 42 U.S.C. 1973j(f).

3. The General Assembly is vested by the Constitution of the State of Georgia with the legislative power of the State and therefore with the power to reapportion House Districts and to promulgate laws with respect to the procedures and requirements for election to the Georgia House of Representatives. Constitution of the State of Georgia, §§2-1301, 2-1502, 2-1920.

4. Defendant Jimmy Carter is sued in his capacity as governor of Georgia and the chief executive officer of the State. He is vested by the laws and Constitution of the State of Georgia with the responsibility of executing the laws of the State of Georgia, including certain acts of the Georgia General Assembly pertaining to elections. Constitution of the State of Georgia, §§2-3001, 2-3012; Georgia Code §34-805.

5. Defendant Ben W. Fortson, Jr. is sued in his capacity as Secretary of State for the State of Georgia. He is vested by law with the obligation to perform certain acts in regard to the conduct of primary and general elections. Georgia Code §34-301. Defendant Fortson is also sued as a member of the State Election Board, which is directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§34-201 *et seq.*

6. Defendants William E. Blanks, M. M. Smith, Matthew Patton, and Melba Williams are sued in their capacities as members of the State Election Board. As such

they are directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§34-201 *et seq.*

7. Defendants Charles H. Kirbo and Robert J. Shaw are sued in their capacities as the chairmen of the State Democratic Executive Committee and the State Republican Executive Committee, respectively, and as such are representatives of the only permanently registered political parties for the purposes of conducting primaries in Georgia. They are directed by law to perform certain functions in regard to the conduct of elections in the State of Georgia. Georgia Code §§34-905, 34-1004, 34-1005, 34-1006.

8. The provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, apply to the State of Georgia.

9. The State of Georgia, through its Attorney General, submitted to the United States Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, the reapportionment proposals for the House of Representatives of the General Assembly. This submission was completed on January 6, 1972; and on March 3, 1972 the United States Attorney General interposed an objection to the reapportionment plan for the House of Representatives. Copies of the House reapportionment plan submitted on January 6 and of the March 3 objection letter are attached as Exhibits 1 and 2, respectively.

10. The Georgia General Assembly passed a new reapportionment plan for the House on March 9, 1972. A copy of this new plan is attached as Exhibit 3. The new plan retains 31 multi-member districts and the numbered post provision and does not provide for the elimination

of the majority (runoff) requirement for being elected to the House. The new plan was submitted to the Attorney General under Section 5 of the Voting Rights Act on March 15, 1972, and was objected to by him on March 24, 1972 (Exhibit 4).

11. The Georgia House of Representatives on March 9, 1972 adopted a resolution (H.R. No. 956—Exhibit 5) which stated, *inter alia:*

> NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority vote.

12. The General Assembly's failure to enact a new reapportionment plan for the House of Representatives which fairly meets the objections of the Attorney General of the United States under Section 5 of the Voting Rights Act, and its adoption of the resolution referred to in Paragraph 11 above, constitute reasonable grounds to believe that the defendants, unless restrained and enjoined by this Court, will enforce or seek to administer a standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

13. The reapportionment plan for the Georgia House which was in effect immediately prior to the plan adopted by the General Assembly on October 14, 1971 (Exhibit 1) was malapportioned under the Fourteenth Amendment and would therefore be invalid for use in the 1972 elections. The State of Georgia recognized this fact when

it stated, through its Attorney General, in its submission under Section 5 of the October 14, 1971 House plan:

> The reason for the adoption of this reapportionment plan was the change in population and population distribution since the last reapportionment. Because of these changes, reapportionment was necessary if the House were to meet the one man-one vote standard.

A copy of that part of Georgia's submission containing the above statement is attached as Exhibit 6.

14. Under Georgia law, candidates for the Georgia House must commence qualifying for the August 8 primary no later than May 31, 1972; and all political parties must close their qualifications for the primary on June 14, 1972. Georgia law also requires that any alterations in precinct boundaries occasioned by changes in the House districts must be made by the county ordinaries by June 9, 1972, and that candidates for the House must file their notices of candidacy for the November 7 general election by August 24, 1972.

WHEREFORE, plaintiff prays that this matter be given expedited consideration and that a court of three judges hear this action pursuant to 28 U.S.C. 2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and thereafter issue a judgment;

> (a) Enjoining the defendants from implementing or seeking to administer the reapportionment plans for the Georgia House of Representatives adopted by the General Assembly on October 14, 1971 and March 9, 1972 (Exhibits 1 and 3) and objected to by the Attorney General on March 3, 1972 and March 24, 1972, respectively; and

(b) Directing the General Assembly to adopt a House reapportionment plan which conforms to the Fourteenth and Fifteenth Amendments of the federal Constitution and which meets the objections made on behalf of the Attorney General of the United States under Section 5 of the Voting Rights Act; or, alternatively, that this Court devise such a plan, through the appointment of a special master or otherwise, and direct the defendants to implement such plan either permanently (until the next decennial Census) or on an interim basis for the 1972 elections.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

/s/ RICHARD G. KLEINDIENST
RICHARD G. KLEINDIENST
Acting Attorney General
/s/ DAVID L. NORMAN
DAVID L. NORMAN
Assistant Attorney General
/s/ JOHN W. STOKES, JR.
JOHN W. STOKES, JR.
United States Attorney
/s/ GERALD W. JONES
GERALD W. JONES
/s/ WALTER GORMAN
WALTER GORMAN
/s/ HARRY C. PIPER
HARRY C. PIPER
Attorneys
Department of Justice
Washington, D. C. 20530

[Complaint Exhibit 1, R. 21, omitted in printing]

[Complaint Exhibit 2; R. 52]

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

MARCH 3, 1972

Honorable Arthur K. Bolton
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This is in reference to the enactments amending Sections 47-101 and 47-102 of the Georgia Code reapportioning districts for the Georgia House and Senate. These reapportionment enactments, which were submitted pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, were initially received by the Department of Justice on November 5, 1971. Additional requested material necessary to complete the submission was received by this Department on January 6, 1972. Under departmental guidelines, the Attorney General's response thus is due on March 6, 1972. Both plans adopt changes in election procedures different from those in effect on November 1, 1964 and, therefore, are properly submitted to the Attorney General under Section 5 of the Voting Rights Act.

As I have indicated on other occasions, we are aware of the inherent difficulties faced by a legislature in devis-

ing comprehensive reapportionment plans such as those here involved. For that reason, and insofar as time limitations have allowed, we have studied both plans in every detail. As a result we find no basis for objecting to any of the plan for the Senate except proposed Senate Districts 36 (in Fulton County) and 22 (in Richmond County). With respect to those, after careful review of all the information available to us we have been unable to conclude, as we must under the Voting Rights Act, that the boundaries of these proposed districts will not have a discriminatory racial effect on voting by minimizing or unnecessarily diluting black voting strength in those areas.

With respect to the reapportionment plan for the House of Representatives, a careful analysis and review of the demographic facts and recent court decisions identify several significant issues. Forty-nine of the 105 districts in the plan are multi-member and we note that it contains a requirement that candidates in those districts must run for numbered posts. We also note that existing Georgia law requires a run off in the event no candidate receives a majority of votes in either a primary or a general election. We note further that of the 105 districts 52 are made up of portions of a county, including 31 of the multi-member districts. These facts suggest that the state's traditional policy of maintaining county lines in designing legislative districts has been significantly modified.

An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgment

of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting. The reasoning of these recent cases is illustrated by the decision of the federal district court in North Carolina which commented with respect to numbered posts in multi-member districts "It is clear that the numbered seat law may have the effect of curtailing minority voting power." (*Scott* v. *Dunston*, E.D.N.C. No. 2666-Civil, Slip Opinion, n. 9 at p. 17, (Jan. 10, 1972). Similarly, the three-judge court considering the Texas legislative reapportionment found both the majority run-off and the numerical post requirement tended to abridge minority voting power and "highlight the racial element where it does exist." *Graves* v. *Barnes*, W.D. Tex., No. A-17-CA-142, Slip Op. at p. 38. See, also, *Sims, Farr, and U.S.A.* v. *Amos*, No. 1744-N, (M.D. Ala., January 3, 1972); *Bussie* v. *The Governor of Louisiana*, No. 71-202 E.D. La., August 24, 1971).

Our analysis further reveals that there is a bloc of adjoining majority-black counties in east central Georgia including Greene, Taliaferro, Hancock, Warren, Washington, Jefferson and Burke Counties. Under the plan in effect on November 1, 1964, each of these counties was represented by one member of the House. Under the present House plan, there are four majority-black, single-member districts in the area—District 28 (Putnam and Hancock Counties), District 35 (Washington County), District 36 (Jefferson County), and District 37 (Burke County). These districts, coupled with the adjoining majority-black counties of Green, Taliaferro and Warren, form a contiguous group—of 89,626 persons, of whom 57.2 percent are nonwhite—enough to form at least three new majority-nonwhite single-member districts. Yet the

submitted plan has only one district in the area with a slight nonwhite population majority (50.56 percent)—new District 59. The other new districts (60, 63, 64, 76 and 78) are "border districts" partly inside and partly outside the majority-nonwhite area and have significant, but minority, nonwhite population percentages. These demographic facts, in the context of a plan that frequently cuts across county lines, do not permit us to conclude, as we must under the Voting Rights Act, that this plan does not have a discriminatory racial effect on voting.

For the foregoing reasons, I must on behalf of the Attorney General interpose an objection to changes submitted by these reapportionment plans. We have reached this conclusion reluctantly because we fully understand the complexities facing any state in designing a reapportionment plan to satisfy the needs of the state and its citizens, and, simultaneously, to comply with the mandates of the Federal Constitution and laws. We are persuaded, however, that the Voting Rights Act compels this result.

Of course, Section 5 permits seeking approval of all changes affecting voting by the United States District Court for the District of Columbia irrespective of whether the changes have previously been submitted to the Attorney General.

Sincerely,

/s/ DAVID L. NORMAN

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

[Complaint Exhibit 3, R. 56, omitted in printing]

[Complaint Exhibit 4; R. 89]

MARCH 24, 1972

Honorable Arthur K. Bolton
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This is in reference to the March 14, 1972 letter from your office submitting to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, H.B. 2085, S.B. 690 and H.B. 1862 which reapportion the Georgia Senate, the Georgia House of Representatives, and the Congressional Districts, respectively.

After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972, letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972, letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives.

Our examination of the new reapportionment of the Senate (H.B. 2085) and Congressional Districts (H.B.

1862) is continuing on an expedited basis, and you will be advised as soon as a decision is made on these enactments.

Sincerely,

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

[Complaint Exhibit 5; R. 93]

H. R. No. 956

By: Messrs. Smith of the 43rd, Murphy of the 19th, Busbee of the 61st, Edwards of the 45th, Lee of the 21st, Roach of the 10th, Dailey of the 53rd and many many others

A RESOLUTION

To invoke the remedial power of the Federal Courts in resolving the untimely dilemma facing the House of Representatives and the electorate of this State regarding reapportionment; and for other purposes.

WHEREAS, the General Assembly of Georgia, meeting in Extraordinary Session, reapportioned itself on a one man, one vote basis in accordance with the 1070 census; and

WHEREAS, acting under Section 5 of the Voting Rights Act of 1965, the Justice Department has interposed an objection to the reapportionment plan of the Georgia House of Representatives; and

WHEREAS, Section 5 of the Voting Rights Act is applicable primarily to the Southern States; and

WHEREAS, the late Mr. Justice Black, dissenting in *Allen v. State Board of Elections,* 393 U. S. 544, has said of Section 5:

> "It seems to me it would be wise for us to pause now and then and reflect on the fact that the separate Colonies were passing laws in their legislative bodies before they themselves created this Union, that history emphatically proves that in creating the Union the Colonies intended to retain their original inde-

pendent power to pass laws, and that no justification can properly be found in the Constitution they created or in any amendment to it for degrading these States to the extent that they cannot even initiate an amendment to their constitution or their laws without first asking the permission of a federal court in the District of Columbia or a United States governmental agency."; and

WHEREAS, the late Mr. Justice Black, in a prior dissent in *South Carolina v. Katzenbach*, 383 U.S. 301, said:

"Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them."; and

WHEREAS, the U. S. Supreme Court has heretofore nullified sophisticated as well as simple minded discrimination; and

WHEREAS, said Section 5 constitutes sophisticated discrimination against the Southern States; and

WHEREAS, the Assistant Attorney General, Civil Rights Division, has stated that he is unable to conclude that the plan of reapportionment of this House does not have a discriminatory racial effect on voting; and

WHEREAS, said Assistant Attorney General is persuaded that a court would conclude that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement would occasion a potential abridgement of minority voting rights; and

WHEREAS, Mr. Chief Justice Warren stated in *Allen v. State Board of Elections*, 393 U.S. 544, that the Attorney General does not act as a court in approving or disapproving legislation; and

WHEREAS, the U. S. Attorney General's office is acting as a court in this instance; and

WHEREAS, the U. S. Attorney General's office lacks the power of a court to remedy the hiatus now existing; and

WHEREAS, this House of Representatives had 45 multi-member districts, numbered posts and a majority (runoff) requirement in the reapportionment plan adopted in 1965; and

WHEREAS, this House of Representatives had 47 multi-member districts, numbered posts and a majority (runoff) requirement in the reapportionment plan adopted in 1968, which plan was approved by the Federal Court; and

WHEREAS, the use of multi-member districts, numbered posts and majority (runoff) requirement in electing members of this House has not changed; and

WHEREAS, the extent of the U. S. Attorney General's authority is to approve or disapprove *changes;* and

WHEREAS, the Attorney General has known since the beginning of this Regular Session of the General Assembly in January, 1972, that the plan of reapportionment for this House contained multi-member districts, numbered posts, and a majority (runoff) requirement; and

WHEREAS, the Justice Department waited until the final days of this Regular Session to notify us of its disapproval; and

WHEREAS, the House of Representatives is required by the Courts, on the one hand, to make a good-faith effort to achieve precise mathematical equality between districts, which this House has done; and

WHEREAS, the House of Representatives is required, on the other hand, to satisfy the Attorney General that the change does not have a racially discriminatory purpose or effect; and

WHEREAS, after diligent efforts this House has been unable to satisfy both the requirement of the Courts and of the Attorney General; and

WHEREAS, the House of Representatives lacks the time to satisfy the Attorney General before the upcoming primaries and elections; and

WHEREAS, the remedial powers of the courts are needed to resolve these issues;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority vote.

BE IT FURTHER RESOLVED that the Clerk of the House of Representatives is instructed and directed to transmit a copy of this Resolution to the Attorney General of the United States.

[Complaint Exhibit 6; R. 98]

Submission by the State of Georgia to the Attorney General of the United States For Approval of an Act Reapportioning the Georgia House of Representatives

ARTHUR K. BOLTON

Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Now comes the State of Georgia by and through its Attorney General and respectfully requests the approval of the Attorney General of the United States of the following reapportionment plan for the Georgia House of Representatives.

I.

This application and submission is made pursuant to § 5 of the Voting Rights Act of 1965, Public Law 89-110, August 6, 1965, 42 U.S.C. § 1973(c) and the regulations promulgated Friday, September 10, 1971, in 28 CFR, § 51.

II.

In compliance with 28 CFR, § 51.10(a), this submission includes:

1) A copy of the reapportionment act for the Georgia House of Representatives certified by the Secretary of State. (Exhibit A).

2) The date of final adoption of the act was October 14, 1971.

3) The change was made by the General Assembly of Georgia.

4) The act was adopted in order to ensure that the apportionment of the Georgia House of Representatives corresponds to the one man-one vote standard enunciated by the United States Supreme Court. The difference between the old and new law is that the new apportionment act establishes districts which are very nearly equal in population. The General Assembly used the 1970 census figures for calculation and contracted with the computer center at the University of Georgia to assist with calculation of population data for each proposed plan.

5) This act has not yet taken effect.

III.

As suggested by 28 CFR, § 51.10(b), the following is also respectfully submitted in order to facilitate the approval of the reapportionment plan:

1) The reason for the adoption of this reapportionment plan was the change in population and population distribution since the last reapportionment. Because of these changes, reapportionment was necessary if the House were to meet the one man-one vote standard.

2) The only anticipated effect of the new plan is that it will ensure equal representation for all citizens throughout the State. (Exhibit B shows the population variances for each district).

3) There is no pending litigation concerning the newly

adopted reapportionment plan for the Georgia House of Representatives.

4) The Georgia House of Representatives also reapportioned in 1968. This change was not submitted because at that time, prior to *Allen v. Board of Elections*, 393 U.S. 544 (1969), it was believed to be unnecessary to submit reapportionment plans to the United States Attorney General pursuant to the Voting Rights Act of 1965. Further, the 1968 reapportionment was required by court order issued in *Toombs v. Fortson*, 277 F. Supp. 821 (N.D. Ga. 1967), by order dated February 7, 1967. See *Connor v. Johnson*, 402 U.S. 690 (1971). (A copy of the 1968 act is attached as Exhibit C).

5) Maps are included as Exhibit D showing the old and new districts. In metropolitan areas detailed maps are submitted to show the exact location of the new boundaries. Such detailed maps for the old boundaries are unavailable at the present time.

iv-v) The figures concerning racial distribution within the districts are available from the Bureau of the Census. Those figures were not used by the General Assembly to calculate the new districts. The General Assembly contracted with the computer center at the University of Georgia to assist in establishing equal districts. The contract specifically prohibited the Center from programming racial data (Exhibit E is a newspaper article describing this contract.)

vi) The maps included as Exhibit D show the new boundaries drawn according to the various divisions chosen by the Bureau of the Census. This was done so that the population figures for each district could

be readily calculated. The Census maps often rely on natural boundaries but such boundaries are not shown on the available maps. The basic plan was to maintain the integrity of the counties, where possible. Where it was necessary to divide a county, the breakdown was according to census county division, census tract, enumeration district, or in a few instances, census blocks.

6) i) Population information by race may be obtained from the Bureau of the Census.

ii) The voting age population by race can be calculated from the data of the Bureau of the Census. This information was unavailable to the Georgia General Assembly since it was not programmed on the computer. (See § 5(iv) above for explanation). The number of registered voters, by race, is not calculated on a state-wide basis. Such information is available only on the voter registration cards in each county.

iii) The General Assembly was not supplied by the computer center with estimates of population by race. It was believed that the use of such data might itself be constitutionally impermissible. The only available source for population data by race would have been the data of the Bureau of the Census.

7) The following evidence of public notice and participation is respectfully submitted or is unavailable for submission.

i) Newspaper articles are attached as Exhibit F.

ii) Announcements of public hearings are attached as Exhibit G.

iii) Newspaper accounts of some public hearings are attached as Exhibit H.

iv) Public statements and speeches are unavailable except as they may be included in the newspaper articles submitted.

v) Comments from the general public are unavailable except as shown by the newspaper articles in Exhibit H which give accounts of public hearings.

vi) The House Journal does not contain information of this type; however, the Georgia Public Television station made tapes of excerpts of most speeches on the floor of the House and Senate. These T.V. tapes have not been transcribed and thus are not available for submission.

The above information is submitted by the Attorney General of the State of Georgia to show that the reapportionment plan was intended to ensure the proportionate representation of all citizens of the State and was not intended and does not have the effect of diluting or debasing the vote of any citizen.

Respectfully submitted,
/s/ ARTHUR K. BOLTON
ARTHUR K. BOLTON
Attorney General

[Submission exhibits A-H omitted from Complaint]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

DEFENSES AND ANSWER OF THE STATE OF GEORGIA, ET AL.

[Filed March 31, 1972; R. 106]

Come now the defendants State of Georgia, the General Assembly of Georgia, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and State Election Board Members William F. Blanks, M. M. Smith, Matthew Patton, and Melba Williams, and respond to the complaint as follows:

DEFENSES

1.

The complaint fails to state a claim upon which relief can be granted, for the reason that:

(a) The basis of the complaint is that the U. S. Attorney General interposed objections to the use of multi-member districts, numbered posts, and the majority (runoff) requirement in the reapportionment of the Georgia House of Representatives.

(b) Before and since November 1, 1964, and the passage of the Voting Rights Act of 1965 (42 U.S.C. § 1973), Georgia was using and has continued to use multi-member districts, posts, and the majority (runoff) requirement in the House of Representatives.

(c) Under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), the U. S. Attorney General has authority to interpose objections only when a state

seeks to administer a practice or procedure with respect to voting different from that in force or effect on November 1, 1964; i.e., the Attorney General has authority to object only to "changes" in a state's election laws.

(d) There having been no change in Georgia's having used multi-member districts, posts, and majority (runoff) requirement since prior to November 1, 1964, the U. S. Attorney General was and is without authority to object thereto.

2.

The complaint fails to state a claim upon which relief can be granted, because the test applied by the U. S. Attorney,—upon which he disapproved the use of multi-member districts, numbered posts and majority (runoff) requirement,—is invalid, for the reason that the Attorney General did not find that such use would have a racially discriminatory effect; he found only that he was unable to conclude that it did not have a discriminatory racial effect, which test is invalid under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c).

3.

The complaint fails to state a claim upon which relief can be granted for the reasons that Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c):

(a) Is not applicable to state reapportionment acts;

(b) Is unconstitutional if applied to state reapportionment acts, in that such application of Section 5 violates:

(1) Article IV, Section 4 of the Constitution which provides that "The United States shall guar-

antee to every state in this Union a Republican Form of Government . . ." in that the action of the Attorney General in disapproving a State reapportionment plan leaves the State without a Republican Form of government;

(2) Article IV, Section 1 of the Constitution which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State" in that, by said Section 5 the Congress has denied full faith and credit to election law changes enacted by Georgia;

(3) Article IV, Section 2 of the Constitution which provides that "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States", and the Ninth and Tenth Amendments which reserve to the States and their people powers not delegated to the United States, in that by said Section 5 the Congress has denied to certain States and their people the right to enact changes in their election laws.

(c) Is unconstitutional on its face for each of the reasons specified herein above.

4.

The complaint fails to state a claim upon which relief can be granted, in that, even if the House reapportionment plan adopted March 9, 1972 (Exhibit 3 to the complaint) were validly disapproved by the U. S. Attorney General, the House reapportionment plan adopted October 14, 1971 (Exhibit 1 to the complaint) would be in effect, for the reason that it was submitted to the Attorney

General on November 5, 1971 (as shown on the face of the complaint, Exhibit 2) and his purported disapproval thereof did not occur until March 3, 1972 (complaint, Exhibit 2), not within the sixty (60) days provided by Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), and hence said reapportionment plan adopted October 14, 1971, is validly in effect for the 1972 elections of members of the Georgia House of Representatives.

ANSWER

Responding to the allegations of the complaint, these defendants answer as follows:

1. These defendants admit the allegations of paragraph one (1) of the complaint, except as said admission may be contrary to the defenses herein set forth.

2. The allegations of paragraph two (2) of the complaint are admitted.

3. The allegations of paragraph three (3) of the complaint are admitted, except that these defendants show that the power vested by the Georgia Constitution in the General Assembly to reapportion House districts and to promulgate election laws has been unconstitutionally negated and impaired by Section 5 of the Voting Rights Act of 1965 as shown by Defense No. 3 hereinabove set forth.

4. The allegations of paragraph four (4) of the complaint are admitted. Responding further to said allegations, defendant Carter shows that he is also a citizen and registered voter, and that he asserts both his personal and official rights in his defenses to the complaint.

5. The allegations of paragraph four (4) of the complaint are admitted. Responding further to said allega-

tions, defendant Fortson shows that he is also a citizen and registered voter, and that he asserts both his personal and official rights in his defenses to the complaint.

6. The allegations of paragraph six (6) of the complaint are admitted for the purposes of this litigation.

7. The allegations of paragraph seven (7) of the complaint are admitted on information and belief.

8. The allegations of paragraph eight (8) of the complaint are admitted, except as said admission is contradicted by the defenses herein set forth.

9. The allegations of paragraph nine (9) of the complaint are admitted, except that defendants show that the submission was completed on November 5, 1971. Defendants incorporate herein their Defense No. 4, and attach hereto as Exhibit A a copy of said submission of November 5, 1971.

10. The allegations of paragraph ten (10) of the complaint are admitted.

11. The allegations of paragraph eleven (11) of the complaint are admitted.

12. The allegations of paragraph twelve (12) of the complaint are admitted, except that defendants deny that the use of multi-member districts, numbered posts and the majority (runoff) requirement is a standard, practice or procedure different from that in force or effect on November 1, 1964 (see Defense No. 1 above, which defendants incorporate herein by reference), and deny that such use is in violation of Section 5 of the Voting Rights Act of 1965.

13. The allegations of paragraph thirteen (13) of the complaint are admitted. Responding further to said al-

legations, defendants incorporate herein by reference their Defense No. 4.

14. The allegations of paragraph fourteen (14) of the complaint are admitted for the purposes of this litigation. Responding further to said allegations, defendants show that the Republican Party has set May 15, 1972, as the first day for qualifying for the Republican primary, and the Democratic Party has set May 17, 1972, as the first day for qualifying for the Democratic primary.

WHEREFORE, these defendants pray that the court of three judges issue judgment:

(a) Sustaining each and all of defendants' four defenses; and

(b) Denying plaintiff's prayers for injunction.

Respectfully submitted,

[Signatures omitted in printing]

[Exhibit A omitted in printing]

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

STIPULATION

[Filed April 14, 1972; R. 306]

Plaintiff, the United States of America, through its attorneys, and defendants State of Georgia, the General Assembly of Georgia, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and State Election Board members William F. Blanks, M. M. Smith, Matthew Patton and Melba Williams (hereinafter referred to collectively as defendants) through their attorneys, stipulate to the following matters for the purpose of this litigation and subject to the Defenses of the State of Georgia heretofore filed:

1. This action is brought by the Acting Attorney General on behalf of the United States pursuant to Section 5 and Section 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973c and 1973j (d), and in order to secure rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and Section 12(f) of the Voting Rights Act of 1965, 42 U.S.C. 1973j(f).

3. The General Assembly is vested by the Constitution of the State of Georgia with the legislative power of the State and therefore with the power to reapportion House Districts and to promulgate laws with respect to the procedures and requirements for election to the Georgia House

of Representatives. Constitution of the State of Georgia, §§ 2-1301, 2-1502, 2-1920.

4. Defendant Jimmy Carter is sued in his capacity as Governor of Georgia and the chief executive officer of the State. He is vested by the laws and Constitution of the State of Georgia with the responsibility of executing the laws of the State of Georgia, including certain acts of the Georgia General Assembly pertaining to elections. Constitution of the State of Georgia, §§ 2-3001, 2-3012; Georgia Code § 34-805. Defendant Carter is a citizen and registered voter of the State of Georgia.

5. Defendant Ben W. Fortson, Jr., is sued in his capacity as Secretary of State for the State of Georgia. He is vested by law with the obligation to perform certain acts in regard to the conduct of primary and general elections. Georgia Code § 34-301. Defendant Fortson is also sued as a member of the State Election Board, which is directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§ 34-201 *et seq.* Defendant Fortson is a citizen and registered voter of the State of Georgia.

6. Defendants William E. Blanks, M. M. Smith, Matthew Patton, and Melba Williams are sued in their capacities as members of the State Election Board. As such they are directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§ 34-201 *et seq.* They are citizens and registered voters of the State of Georgia.

7. The State of Georgia is one of those States with respect to which the prohibitions of Section 4(b) of the Voting Rights Act of 1965 (42 U.S.C. § 1973b(b)) are

in effect within the meaning of Section 5 of that Act (42 U.S.C. § 1973(c)).

8. On September 10, 1971, the "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" were published in the Federal Register, Vol. 36, No. 176. Prior to the preparation of any materials with respect to a reapportionment plan for the Georgia House of Representatives for submission to the United States Attorney General, the Georgia Attorney General's office was aware of the existence of these regulations and was in possession of one or more copies thereof. A true copy of these regulations is attached hereto as Stipulation Exhibit A.

9. The United States Attorney General received on November 5, 1971, from the State of Georgia, through its Attorney General, the October 14, 1972, reapportionment act for the House of Representatives of the General Assembly, as shown by its "Submission", true copies of which appear as Exhibit 6 to the Complaint and as Exhibit A to the Defendants' Answer. This "Submission" included the October 14, 1971, House reapportionment act (a true copy of which appears as Exhibit 1 to the Complaint), included the population variances referred to in paragraph III(2) (a true copy of which appears as Exhibit B to Defendants' Answer) of the "Submission", included statewide maps of the old (1968) and new (1971) districts (true copies of which appear as Stipulation Exhibits B and C, respectively, attached hereto), and included the other maps and materials referred to in said "Submission", which maps and materials can be made available to the Court upon request.

10. By letter dated November 19, 1971, signed by Mr. David L. Norman, Assistant Attorney General, Civil

Rights Division, Department of Justice, additional information to complete the "Submission" was requested. A true copy of said November 19, 1971, letter is attached hereto as Stipulation Exhibit D. Said additional information was received by Mr. Norman on January 6, 1972, under cover letter from the Georgia Attorney General, a true copy of which is attached hereto as Stipulation Exhibit E. The materials referred to in said Stipulation Exhibit E can be made available to the Court upon request.

11. By letter dated March 3, 1972, the Department of Justice interposed an objection to the October 14, 1971, reapportionment plan for the House of Representatives. A true copy of said letter of March 3, 1972, appears as Exhibit 2 to the Complaint.

12. On the last day of its regular 1972 session, the Georgia General Assembly passed a new reapportionment plan for the House on March 9, 1972. A true copy of this March 9, 1972, plan appears as Exhibit 3 to the Complaint. The new plan retains 31 multi-member districts and the numbered post provision and does not provide for the elimination of the majority (runoff) requirement for being elected to the House. The new plan was submitted to the U. S. Attorney General under Section 5 of the Voting Rights Act on March 15, 1972. This "Submission" included the map of the new plan attached hereto as Stipulation Exhibit F. The "Submission" and other materials submitted on March 15, 1972, can be made available to the Court upon request. The March 9, 1972, plan was objected to by letter dated March 24, 1972, a true copy of which appears as Exhibit 4 to the Complaint.

13. The Georgia House of Representatives on said

March 9, 1972, adopted a resolution (H.R. No. 956) which stated, *inter alia:*

> NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority vote.

A true copy of said Resolution appears as Exhibit 5 to the Complaint.

14. The General Assembly's failure to enact a new reapportionment plan for the House of Representatives meeting the objections of the Attorney General of the United States, and its adoption of the resolution referred to in paragraph 13 above, constitute reasonable grounds to believe that the defendants, unless restrained and enjoined by this Court, will enforce or seek to administer the House reapportionment plan enacted on March 9, 1972.

15. The 1968 reapportionment plan for the Georgia House which was in effect immediately prior to the plan adopted by the General Assembly on October 14, 1971, was malapportioned under the Fourteenth Amendment and would therefore be invalid for use in the 1972 elections. The State of Georgia recognized this fact when it stated, through its Attorney General, in its submission under Section 5 of the October 14, 1971 House plan:

> The reason for the adoption of this reapportionment plan was the change in population and population distribution since the last reapportionment. Because of these changes, reapportionment was necessary if

the House were to meet the one man-one vote standard.

A true copy of that part of Georgia's submission containing the above statement is attached to the Complaint as Exhibit 6.

16. Under Georgia law, candidates for the Georgia House may commence qualifying for the August 8 primary as early as May 15, 1972, the first day for qualifying for the Republican primary, or May 17, 1972, the first day for qualifying for the Democratic primary, and all political parties must close their qualifications for the primary on June 14, 1972. Georgia law also requires that any alterations in precinct boundaries occasioned by changes in the House districts must be made by the county ordinaries by June 9, 1972, and that candidates for the House must file their notices of candidacy for the November 7 general election by August 24, 1972.

17. The parties stipulate that the Court may take judicial notice of Georgia law, including but not limited to, the following:

Reapportionment acts:

1961 Ga. Laws, p. 111.
1965 Ga. Laws, p. 127.
1967 Ga. Laws, p. 187.
1968 Ga. Laws, p. 209.

Designated post requirement:

1953 Ga. Laws, Nov. Sess., p. 269, Code Ann. § 47-119.
1964 Ga. Laws, Ex. Sess., p. 26 at p. 89.
1965 Ga. Laws, p. 127 at pp. 172-173.

1967 Ga. Laws, p. 187 at p. 219.
1968 Ga. Laws, p. 209 at p. 246.

Majority (runoff) election requirement:
1962 Ga. Laws, pp. 1217, 1218; Code Ann. § 34-3212(c).
1964 Ga. Laws, Ex. Sess., p. 26 at pp. 174-175.

18. The parties stipulate that the Court may take judicial notice of the case of *Toombs v. Fortson*, including but not limited, to the following:

Toombs v. Fortson, 241 F.Supp. 65 (1965).
Toombs v. Fortson, 275 F.Supp. 128 (1966).
Toombs v. Fortson, 384 U.S. 210 (1966).
Toombs v. Fortson, 277 F.Supp. 821 (1967).
Toombs v. Fortson, Final Judgment dated May 13, 1968, a true copy of which is attached hereto as Stipulation Exhibit G.

19. This Stipulation may be supplemented by agreement of the parties or evidence may be offered if a need therefore arises.

This 14th day of April, 1972.

[Signatures omitted in printing]

[Stipulation Exhibit A, R. 313, omitted in printing; see 28 C.F.R. 51]

[STIPULATION EXHIBIT D; R. 320]

DEPARTMENT OF JUSTICE

WASHINGTON

NOVEMBER 19, 1971

Honorable Arthur K. Bolton
Attorney General
State of Georgia
State Judicial Building, Room 132
Atlanta, Georgia 30334

Dear Mr. Attorney General:

I am writing in reference to the redistricting plans for Georgia's House and Senate districts and Congressional districts, submitted pursuant to Section 5 of the Voting Rights Act of 1965, and received by this Department on November 5, 1971. This letter also confirms telephone conversations between Mr. Harold N. Hill of your office and departmental attorney Harry Piper on November 12, 1971, and between Dorothy Y. Kirkley of your office and Mr. Piper on November 19, 1971.

After a preliminary examination of the initial submission, this Department has determined that the data sent to the Attorney General are insufficient to evaluate properly the changes you have submitted. In accordance with Sections 51.10(a)(6) and 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (36 Federal Register 18186-18190, September 10, 1971), would you please assist us by providing this Department the following additional information:

1. The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate dis-

tricts, and for the old (1964) and new (submitted) Congressional districts.

2. 1970 Census maps showing the precise district boundaries for any submitted State Senate or State House district which divides any county or city. (Such maps have already been submitted for the metropolitan areas of Atlanta, Savannah, Augusta, Columbus, and Cobb County for submitted House districts and for the metropolitan areas of Atlanta, Albany, Macon, Augusta, Savannah, and Columbus for submitted Senate districts).

3. Maps showing the precise district boundaries for any State Senate or State House district in the 1968 redistricting plan which divides any county or city.

4. A statewide map showing the State Senate and State House Districts in the 1964 redistricting plan, and maps showing the precise district boundaries for any such districts which divided any county or city.

5. A history (for the last two elections) of every primary or general election contest for State Senate, State House, and for United States Congress in which there were one or more black candidates running. This history should include for each such contest the district involved, the names of the candidates (designated by race), and the number of votes received by each candidate.

6. The name, home address, and race of each present State Senator, State (House) representative, and U. S. Congressman from Georgia.

7. A legislative history of each submitted redistricting plan (the names of the sponsoring legislators for each of the three final bills, copies of all proposed alternative plans, the date and names of sponsoring legislators for

each proposed alternative plan, and the names of legislators who voted in opposition to each of the final bills and to each of the proposed alternatives).

As you know, the Attorney General has a 60-day period to consider enactments submitted pursuant to Section 5. As is provided in Section 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, the 60-day period will not commence until the above-requested information, completing your submission, is received by the Department.

If we can assist you in any way in gathering this additional information or should you wish to discuss any questions raised by this letter, please do not hesitate to call on me or my staff.

Sincerely,

/s/ DAVID L. NORMAN

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

[STIPULATION EXHIBIT E; R. 323]

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA
30334

ARTHUR K. BOLTON
ATTORNEY GENERAL

132 STATE JUDICIAL BUILDING
TELEPHONE 656-3300

Mr. David Norman
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Norman:

As requested, we are furnishing the additional information listed in your letter of November 19, 1971. The following is included:

1) The 1970 Census population, by race, for the 1964 (Senate), 1965 (House), 1968, and submitted (1971) State House and Senate Districts, and for the old (1964) and new (submitted) Congressional districts. For the three submitted plans, this information will be accurate since it has been figured by computer directly from the reapportionment bills which used boundaries chosen by the Bureau of the Census when drawing the new districts. The 1970 Census population, by race, for the 1964, 1965, and 1968 plans are less exact. They were calculated by drawing the district lines on a census map whenever a county was divided and then using the included census areas to calculate the racial data. The maps were carefully

drawn; however, complete accuracy would be impossible to guarantee.

It should be noted that this compilation of racial data is the first done by the computer center at the University of Georgia. It was believed that such computation was in violation of the contract made by the General Assembly with the Reapportionment Project at the University of Georgia. However, at the direction of the Speaker of the House of Representatives, the figures have been calculated in order to expedite approval of Georgia's three submitted plans. (A letter from Dr. Delmer Dunn of the Political Science Department is attached to the computations of the racial data).

2) 1970 Census maps for those counties outside metropolitan areas which were split by the submitted reapportionment bills. These were drawn on maps showing census county divisions if the split were along those lines or on maps showing enumeration districts where such detail is required.

3) Maps showing the precise district boundaries for each Georgia Senate or House District which divided a county in the 1968 reapportionment plan. (Some of these boundaries remained unchanged from 1964 or 1965 to 1968).

4) Statewide maps showing the Georgia Senate and House Districts in the 1964 and 1965 reapportionment and maps showing precise boundaries for those counties split by the 1964 and 1965 plans. (Also included is a copy of the 1964 and 1965 legislation establishing the Senate and House Districts).

5) A history, for the last two elections, of every primary or general election contest for the Senate, House or

U. S. Congress in which there were one or more black candidates running. As is explained in that history, the list is not official but was prepared with the assistance of the staff of a knowledgeable State legislator.

6) A book prepared by the Secretary of State listing the names and home addresses of State legislators with race designated. A list of U. S. Congressmen from Georgia and their home addresses is also included.

7) A legislative history of each submitted reapportionment plan. To prepare this history, excerpts from the House and Senate Journals have been copied. The excerpts include each day during the Special Session concerned with reapportionment. Included are all proposed bills voted on by the Senate or House, along with the record of the roll call vote.

Very truly yours,

ARTHUR K. BOLTON
Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

Transcript of proceedings [R. 373] had before the Honorable Griffin B. Bell, Circuit Court of Appeals Judge, Honorable William C. O'Kelley, United States District Judge, and Richard C. Freeman, United States District Judge, in Atlanta, Fulton County, Georgia, on April 14 and April 18, 1972 in the above-styled action.

The parties in the District Court waived the transcription of the hearings by a reporter. In the absence of an official transcript, this document has been prepared from the recollections of the parties pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure. The document represents a selective paraphasing of relevant parts of the roughly six hours of hearings and is not an attempt at a complete "transcript".

APPEARANCES OF COUNSEL:

For the Plaintiff:

James P. Turner, Deputy Assistant Attorney General Department of Justice

Harry C. Piper, III, Attorney, Department of Justice

John W. Stokes, Jr., United States Attorney

For the Defendants:

Harold N. Hill, Jr., Executive Assistant Attorney General

Robert J. Castellani, Assistant Attorney General

Dorothy Y. Kirkley, Assistant Attorney General, State of Georgia

[T. 2] (Atlanta, Georgia; Friday, April 14, 1972, in open court, commencing at 3:00 p.m.)

* * *

Following the introduction of Mr. Turner and Mr. Piper, the Court noted that a pre-trial conference had been held previously at which time all parties, through their attorneys, had agreed to the dismissal of the political party defendants. An order dismissing such defendants was tendered to the Court and signed. Attorney J. Robert Cooper presented to the Court a motion for leave to file a brief for Jimmy R. Jones, Howard Kaylor, and J. T. Frye as *amicus curiae*, with regard to District 4 in northeast Georgia. There being no objection from the Court or the parties, the Court granted leave to file the brief at the next hearing in the case.

MR. TURNER (Attorney for the plaintiff): This suit was brought by the United States to enforce the Voting Rights Act of 1965, and, in particular, to enforce Section 5 of that Act. The facts of the case are not disputed by the parties and no witnesses will be called.

Last fall the Georgia legislature, responding to 1970 Census data and this Court's directive in *Toombs* v. *Fortson*, reapportioned its Congressional and State House and Senate Districts.

[T. 3] Section 5 of the Voting Rights Act prohibits the implementation of any new legislative act in Georgia dealing with voting procedures until those new procedures have received favorable review under Section 5 either from the Attorney General or from the United States District Court for the District of Columbia. Over 150 such submissions have been received by the Justice Department from Georgia since the enactment of the Voting Rights

Act of 1965, and the Department objected to 17 of them (in whole or in part), or a little over 10 percent.

Recognizing the duty to obtain Section 5 clearance, the Georgia Attorney General in 1971 and 1972 submitted the Congressional, Senate and House apportionment acts to the Justice Department. An objection was interposed to the boundary between the Fifth and Sixth Congressional Districts; this boundary was changed by the General Assembly and the resubmitted Congressional plan was approved by the Department. Two Senate Districts were objected to, changed by the General Assembly, and later approved. The submitted October 19, 1971, House plan was objected to on the ground that its multi-member districts, as combined with other parts of the State's election procedure (numbered posts and the majority-win [runoff] requirement), tended unnecessarily to [T. 4] dilute black voting strength in the state. The legislature also took up this objection, and dealt with some of the problems raised. (Some districts in the so-called "black belt" area of east-central Georgia were changed, and the number of multi-member districts was reduced from 49 to 31). But apparently the legislature concluded it would do no more, since it passed a resolution saying that it had done all it was going to do. Thirty-two multi-member districts remained in the plan, as well as the numbered post provision and the majority requirement. This second House plan was also submitted to the Attorney General, on March 15, 1972, and was also objected to, on March 24, 1972.

The March 9 resolution, in effect, announced the legislature's unequivocal intention to implement the March 9,

1972, reapportionment plan in the upcoming 1972 elections.

THE COURT (Judge Bell): And invoked the remedial power of the Federal Court.

MR. TURNER: Yes, Your Honor, and invoked the remedial power of the Court. This suit was filed to enjoin the State's violation of the Voting Rights Act.

THE COURT (Judge Bell): We are not going to let you tear up Georgia's system of government. There are some counties in which there are no Negroes. Does the Attorney General object to those?

[T. 5] MR. TURNER: There are some multi-member districts in which the minority population is very small.

THE COURT (Judge Bell): You don't object to those, do you? Which ones are they?

MR. TURNER: I do not know them by number. I am sure that counsel can agree on some of them.

Your Honor, I am perfectly agreeable to discussing the precise areas where we feel the plan is objectionable under the Act. However, Mr. Hill has challenged the legality of the objection itself on several grounds and it might be more orderly for the Court to hear from him on these legal points. If he is upheld as to these points there would be, of course, no occasion to discuss specific relief.

THE COURT (Judge Bell): Maybe we should hear from Mr. Hill now.

Mr. Hill, attorney for defendants, introduced the Stip-

ulation of the parties and listed the four defenses of the State.

THE COURT (Judge Bell): Now Mr. Hill, we will listen to your arguments about the unconstitutionality of Section 5, but I think that issue has been settled by the Supreme Court in *South Carolina* v. *Katzenbach*. Many people in the South don't like Section 5, and every time the Attorney General objects to a new voting procedure, we get arguments that Section 5 is unconstitutional. You [T. 5A] had Justice Black on your side, but I'm afraid the issue has been pretty well settled.

MR. HILL: *Katzenbach* did not consider whether Section 5 is constitutional if applied to reapportionment, Your Honor.

Mr. Hill pointed out that multi-member districts were used in Georgia as early as the Constitution of 1877, that post designation by naming the incumbent began as local legislation as early as 1925 and was enacted as general law in 1953, and that the majority (runoff) requirement was applicable in primaries as [T. 6] early as 1962 and was made applicable in primaries and general elections in the 1964 Election Code enacted in the summer of 1964.

Mr. Hill pointed out that Glynn County had been a two man multi-member district in the reapportionment of 1961, a two man district in the reapportionment of 1965, a two man district in 1967 and again in 1968, and a two man district in 1971 and 1972.

THE COURT (Judge O'Kelley): Mr. Hill, were there any districts in the House plan which were changed from single-member districts to multi-member districts?

MR. HILL: Yes, Your Honor, there undoubtedly were such districts.

Mr. Hill argued the four points enumerated in the State's Trial Memorandum, citing in addition *Bauers* v. *Heisell*, 361 F. 2d 581 (C.A. 3, 1966), and *United States* v. *Downey*, 195 F. Supp. 581 (S.D. Ill., 1961).

THE COURT (Judge O'Kelley): Now, on the sixty-days issue. The Attorney General's objection was more than sixty days after receipt of the initial information in November, but it was less than sixty days after the requested additional information was received in January, is that correct?

MR. HILL: Yes, Your Honor, that is correct.

[T. 7] THE COURT (Judge O'Kelley): If the Attorney General were unable to toll the running of the sixty-days to get information he needed to make his decision under Section 5, couldn't he just object to a submission before the first sixty days ran out, and maintain that objection at least until the additional needed information were forthcoming?

MR. HILL: Your Honor, we recognize that any victory by us on the sixty-days issue would be short-lived.

MR. TURNER: If it please the Court, I should like to respond to some of the points raised by Mr. Hill.

I think it is quite clear after the Supreme Court's decisions in *Allen* v. *State Board of Elections* and *Perkins* v. *Matthews* that a statewide reapportionment would be subject to the requirement of Section 5 review. The Court in the *Allen* case, 393 U.S. at page 566 stated: "The legislative history on the whole supports the view that Con-

gress intended to reach any state enactment which altered the election law of a covered State in even a minor way." Later the *Allen* court at page 568 of the opinion stated that Congress intended that "all changes, no matter how small, be subjected to Section 5 scrutiny." Certainly a reapportionment of the whole state of Georgia would come within this language.

[T. 8] On the issue of whether there has been a change from November 1, 1964—reapportionment consists of the legislature evaluating every district in the state. Some districts may come out the same, and some may differ; new systems may be used, and new groupings may be made in response to the new census data and relevant new court opinions. Each reapportionment act at issue here repealed the entire existing reapportionment plan and then set out the new plan. Georgia's House plans for the first time abandoned the sanctity of county boundaries, and contained a mixture of floating representatives, and multi- and single-member districts. Most districts have different boundaries than they did before, but a few are the same.

The statutory language of Section 5 itself indicates that the Attorney General is not merely evaluating the change. The change is the occasion for an evaluation of the new voting procedure under the current law and facts. If a voting procedure is different from that in force or effect on November 1, 1964, the question for the Attorney General is whether [quoting from Section 5] "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." The question is whether the new voting procedure is or is not discriminatory; not whether it is or is not more discriminatory than the old one. The Supreme

Court in *South Carolina* v. *Katzenbach*, 383 U.S. [T. 9] at page 315 and 316, described the operation of Section 5 as "the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination."

On the issue of what finding must be made by the Attorney General as a basis for his objection, we believe it is clear from the legislative history, from the statutory structure of Section 5, and from the Supreme Court's interpretation of Section 5 in the Allen case, that the Attorney General is acting, in effect, as a surrogate for the District Court for the District of Columbia when he passes on Section 5 submissions. If that is so, the burden of proof should not be different just because the state chooses to go through the Attorney General instead of through the District Court for the District of Columbia. We submit, therefore, that our language in the objection letter to the State, that we were unable to conclude that the plan was not discriminatory, was a sufficient basis for objection. We said all we believed we had to say.

THE COURT (Judge Bell): Do you usually use such language in your objection letters, as a matter of course?

MR. TURNER: We have not always used such language Your Honor, but we use it quite often.

[T. 10] THE COURT (Judge Bell): It might be just a politic way of phrasing your objection. It might be easier to tell somebody you couldn't conclude that he was not discriminating, rather than to tell him outright that he was discriminating. But we need to know which districts you are talking about. We are still in the dark about that. What evidence is there of discrimination in the reapportionment plans?

MR. TURNER: It is our position, Your Honor, that the United States does not have to prove discrimination. I think the Supreme Court has made that quite clear in the *Allen* and *Perkins* decisions. However, if your Honor wishes, Mr. Piper can pinpoint some of the grounds for our objection.

MR. HILL: I do not want to give up any rights of our clients, but neither do I want to lead the Court into error. It is my understanding of the law that the Justice Department is not required to prove discrimination.

[The Court then took a fifteen-minute recess.]

THE COURT (Judge Bell): I think we have to realize that Congress was angry when it passed the Voting Rights Act of 1965. It was right after the experiences in Selma, Alabama, and they gave the Attorney General broad powers and unfettered discretion in reviewing new voting regulations. We just have to put blinders on and see whether the Attorney General's objection was precedurally valid.

[T. 11] THE COURT (Judge Freeman): We have had sufficient discussion on most of these points, but we need to hear some specific evidence as to whether there has been a change. How is the new reapportionment plan different from the preceeding ones?

MR. TURNER: Mr. Piper can pinpoint the changes, Your Honor, and we would also like to clarify some other points.

MR. PIPER: May it please the Court, I would first like to clarify one point that there may have been some confusion about earlier. The United States does not con-

test that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan.

There were certainly some multi-member districts in 1964, but the submitted multi-member districts were different ones—that is, their boundaries were largely different, or there are a different number of representatives to be elected from them. Mr. Hill has conceded that there have been some changes from single-member districts to multi-member districts, [T. 12] and I don't think he would contest that many district boundaries have changed. For example, the latest reapportionment plans for the first time in Georgia's history have a widespread breaking of county boundaries. In the 1971 plan, 31 of the 49 multi-member districts, and 21 of the 56 single-member districts, break county boundaries. In the 1972 plan, 22 of the 32 multi-member districts, and 37 of the 96 single-member districts, break county boundaries. At least as to these districts, the boundaries are by definition different from previous plans.

I might say a word here about the nature of this action and the relief we are seeking. We realize it is difficult for a Judge to grant relief in a case when he doesn't know the basis for the Attorney General's finding of discrimination. I know it would be difficult for me if I were a Judge. But we have to live with Section 5 the way it was written by Congress, and the way it has been interpreted by the Supreme Court. This is not a Fifteenth Amendment lawsuit,

and we are not here to prove discrimination. It is our contention that if you find in our favor on the four defenses which have been raised by the State, then neither of the House reapportionment plans which have been objected to by the Justice Department can be used by the State and they should be enjoined from doing so.

The State could then either go back to the 1968 court-approved plan, or a new plan could be drawn up to meet the Attorney General's objections. Now, I think we all agree the 1968 plan is seriously malapportioned according to 1970 census data . . .

[T. 13] THE COURT (Judge Bell): Maybe we should ask Mr. Hill whether they would want to go back to the 1968 plan. I believe the General Assembly was under a court order to reapportion themselves anyway. I was on the panel in the 1968 case. The legislature was under a court order to reapportion, were they not, Mr. Hill?

MR. HILL: Yes, Your Honor, that was in the case of *Toombs* v. *Fortson*, to which we have alluded earlier. The General Assembly knew it had to reapportion itself after the 1970 census material became available. The 1968 plan had become outdated.

THE COURT (Judge Bell): Well, you couldn't use that plan anyway, because the legislature was under the court order to change it.

MR. PIPER: Your Honor, the relief we are seeking in this case is somewhat unusual. In the normal Section 5 case, we would simply ask that the legislature draw up a new plan and submit it to the Attorney General or the United States District Court for the District of Columbia for approval. But here, plans have been submitted twice already and we have failed to get a satisfactory plan. We

have asked that the new plan be submitted to this Court, or that the Court draw a new plan itself. Because of the time element, we couldn't keep having plans go back and forth between Georgia and Washington like ping-pong balls. We wanted to have a plan worked out right here in this proceeding.

[T. 14] THE COURT (Judge Bell): How do we know the Justice Department wouldn't insist on reviewing under Section 5 any plan which we might develop here, if you were still dissatisfied with it?

MR. PIPER: We would not insist on such a review after this proceeding, Your Honor. That is why we filed this lawsuit—to get a final plan. We will make any comments or objections we may have within the confines of this proceeding.

MR. TURNER: Your Honor, I want to assure the Court unequivocally that the Justice Department has no intention of trying to review any plan coming out of this Court under Section 5. I am not sure we could anyway, in light of *Connor* v. *Johnson*, in which the Supreme Court said, "A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act."

THE COURT (Judge Bell): Mr. Hill, assuming that the Court overrules your defenses, what about relief? Does the General Assembly want to reapportion itself or does it want the Court to do it?

MR. HILL: May it please the Court, I hate to discuss the surgery before it has been decided that the operation is necessary. However, subject to the four defenses, the General Assembly has always responded to this Court's orders. I feel sure they would rather do it themselves.

[T. 15] MR. GEORGE L. SMITH (Speaker of the Georgia House of Representatives): May I be heard, Your Honor? The House worked hard on reapportionment and we did a good job. Or at least we thought we did. If it has to be done again, we would like to try to do it. But we would need guidelines from the Court. It can't be done without guidelines.

THE COURT (Judge Bell): The United States has indicated it does not object to all multi-member districts. Mr. Turner, please consult with Mr. Hill about those districts.

MR. TURNER: Your Honor, we are willing to specify which multi-member districts have cognizable racial minorities whose voting rights, in our view, appear to be diluted by the combination of multi-member districts, the majority requirement, and the numbered post provision. However, we would prefer not to get into the business of drawing lines and forming particular districts.

THE COURT (Judge Bell): Very well, we will reconvene in my chambers, my library, on Tuesday, April 18, at 3:00 p.m. We will now take up the case against the Senate reapportionment plan.

[T. 16] (Atlanta, Georgia, Tuesday, April 18, 1972, commencing at 3:00 P.M.)

THE COURT (Judge Bell): Because of the number of interested spectators, we are in the court room but we will proceed as if we were in chambers. Mr. Hill, we are going to overrule the State's defenses. Our decision will be written tomorrow. Have you met with the Justice Department attorneys?

MR. TURNER: We have consulted together, Your Honor. I would like to file our Interim Report to the Court. As you will see, we have represented ten multi-member districts as not containing cognizable racial minorities, and we will not object if they are left in the plan to be developed. Each has a non-white population of under 10%.

THE COURT (Judge Bell): District number 4 is in that group. We have an amicus brief asking that it be made into single-member districts. We had a motion to intervene as to district number 56 in DeKalb County but I understand it has been withdrawn and that a separate suit will be filed as to it.

MR. TURNER: Six multi-member districts contain larger non-white populations, but we represent that they are so diffused that we find no significant dilution of non-white voting strength. We will not object to them remaining multi-member districts.

[T. 17] As to Fulton County, there are 21 single-member districts and 3 "floating representatives." Because of the difficulty of redistricting Fulton County for this year's elections, and because we have received no real complaints on the present districts there, we have included Fulton County with the districts where we see no significant dilution of minority voting strength. That leaves 15 multi-member districts to which we maintain our objection and which we feel should be subdivided according to the guidelines we have set out in our Report.

THE COURT (Judge Bell): Why don't you show us where these 15 districts are.

MR. TURNER: Mr. Piper can show you where they are on the map.

MR. PIPER: [Whereupon Mr. Piper identified each of the 15 multi-member districts to which the Justice Department maintained its objection, by reading off the particular counties involved and pointing them out on the map included in the record as Stipulation Exhibit F.]

THE COURT (Judge Bell): Now, on the other districts, to which you are not maintaining, as I take it, your objection on racial grounds. You suggest that the Court may wish to consider whether multi-member districts should be allowed to stand under the Equal Protection Clause when there are single-member districts in other, "similarly situated" areas. What do you mean by "similarly situated"?

[T. 18] MR. PIPER: Well, Your Honor, I would think Georgia's large metropolitan areas would be "similarly situated." For example, why should there be all single-member districts in the Savannah area, but a large 6-member district in the Macon area? The District Court in the Texas case, *Graves* v. *Barnes*, considered the Houston area, which had all single-member districts, to be similarly situated with the San Antonio (Bexar County) and Dallas areas, which had large multi-member districts. There would also be more rural areas of Georgia which would be similarly situated. There is one good example up here in northeast Georgia [pointing to map], which I believe is the subject of the *amicus* brief which has been filed in this case. District 4 is a 2-member district stretching all the way from Fannin County on the west to Rabun County on the east. Side by side with District 4, and just to the south of it, is District 11, which is a single-member district comprising Habersham County and part of White County. Certainly districts which are side by side like that would be similarly situated.

THE COURT (Judge Bell): Isn't it true, Mr. Piper, that our state and local governments are supposed to be free to experiment, that they are laboratories for testing out new forms of democracy? We have many [T. 19] different areas in the State of Georgia. Maybe they are trying out something new up there in the mountains of north Georgia. Give me your best argument on why we should consider eliminating these other multi-member districts.

MR. PIPER: Your Honor, I agree that the state and local governments should be laboratories for democracy, so long as they have a rational basis under the Equal Protection Clause for what they are doing. There just doesn't seem to be any consistently applied rational basis for these Georgia plans. There are single-member districts, multi-member districts, and floating representatives scattered all over the place, with no apparent rhyme or reason. Also, as the Court mentioned in the Texas case, there may be discrimination against poor candidates in the multi-member districts. Generally speaking, it costs more to campaign in a multi-member district. You have to cover a wider area and reach more people.

MR. TURNER: Your Honor, we mentioned the Fourteenth Amendment in our Interim Report only as a service to the Court and the parties, so that we would not come out with a plan which might be vulnerable to attack on non-racial grounds. Our principal concern, of course, is with preventing any adverse racial effects in the plan.

[T. 20] THE COURT (Judge Bell): Mr. Hill, what advice do you have for your clients. Many of them are present in court.

MR. HILL: Your Honor, there are many lawyers in the General Assembly, there are many conflicting interests. I do not feel that I can tell them what they have to do. I do object however particularly to the last paragraph of Section 5 of the government's Interim Report. *Dunston* v. *Scott* did not outlaw multi-member districts. It outlawed the anti-single shot law in effect in some North Carolina counties and also the numbered seat law in effect in some multi-member districts. This was done on equal protection grounds, not the 15th Amendment. If the numbered seat law had been in effect in all multi-member districts, it appears it would not have been invalidated.

In *Graves* v. *Barnes*, the Texas decision cited by the government, it appears that only one judge concurred in Section two of the per curiam opinion, Judge Justice. The other two judges did not agree with that section of the opinion regarding multi-member districts. The Dallas County situation in section three of the opinion is distinct. They had a "jay bird" committee, the D.C.R.G., controlling the elections in Dallas. The Court also found actual discrimination in Bexar County, San Antonio, as to Mexican-Americans. I believe my understanding of the [T. 21] Texas decision is confirmed by Mr. Justice Powell's analysis of the case in denying a stay as to Dallas and Bexar Counties.

Last week, ten days ago now, the Court in *Twiggs* v. *West* upheld numbered seats in multi-member districts in the South Carolina Senate plan. South Carolina has majority runoffs in its primaries.

Moreover, this last paragraph of Section 5 of the government's Report is contrary to *Whitcomb* v. *Chavis*. In

that case the Supreme Court said that the challenger must "carry the burden of proof that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."

THE COURT (Judge Bell): Mr. Turner, the Court agrees with you as to 14 of the 15 multi-member districts listed in paragraph Four of your Interim Report. We are not sure whether we agree as to District 128, Glynn County. It has been a 2-man district as long as I can remember. We will require that these 14 districts be subdivided. Mr. Speaker and Mr. Williams [Chairman of the House Reapportionment Committee], you should consider subdividing Glynn County anyway, at least on the other, not necessarily racial, grounds we have discussed. There will be a hearing on the separate lawsuit as to District 56 in DeKalb County at a later date. You could make that lawsuit moot by subdividing District 56. The Court has not ruled on the issues raised in the *amicus* brief as to [T. 22] District 4 in northeast Georgia. The General Assembly can risk leaving District 4 unchanged if it wants, but our ruling could go against them. You can moot this problem also by subdividing the district.

MR. SPEAKER SMITH: Your Honor, should we use the guidelines suggested by the United States in their Interim Report to fashion our new districts?

THE COURT (Judge Bell): Well, Mr. Speaker, we are not ordering these particular guidelines to be used. But if you want to get this reapportionment over with, it would be wise to work with the Justice Department and try to do what they want.

MR. TURNER: May it please the Court, I would like to address the Glynn County situation. If there has been

a discriminatory racial effect on voting in Glynn County for many years, that is no reason for allowing the discrimination to continue. As we have stated earlier, the legislature repealed the entire existing reapportionment plan before it set to work on the new plans which are the subject of this lawsuit. The Glynn County district is part of the whole new reapportionment plan, and the legislature had an affirmative choice as to what district to draw there, just as it made a choice in every other part of the state. Glynn County is one part of the new reapportionment plan which, as a whole, is different from the plan in force or effect in 1964.

[T. 23] THE COURT (Judge Bell): Yes, Mr. Turner, we understand your arguments on that. Judge Freeman agrees with you, but we just have not made up our minds yet.

MR. TURNER: Judge Freeman is very perceptive. [Laughter.]

THE COURT (Judge Bell): The State should be prepared with a rational basis, not a compelling interest, but a rational basis, for any multi-member districts which it leaves in the new plan to be developed. To the extent that you subdivide some of the 17 multi-member districts not objected to by the Justice Department, the question would be moot. It seems to me a little risky to have a special session and not take care of all of this. To be absolutely safe you wouldn't have any multi-member districts.

MR. SPEAKER SMITH: Your Honor, the General Assembly of Georgia has never failed to obey a court order, and we will not do so now. We can have a special session next week, starting Monday, April 24. I cannot

speak for the Governor, but I am confident that we can have a special session right away. But I have a request for the Court. We will want to get a ruling on our new plan as soon as possible, in case we would have any more work to do on it. Could we have a ruling on it right after the special session next week?

[T. 24] THE COURT (Judge Bell, after conferring with J. O'Kelley and J. Freeman): Yes, Mr. Speaker, we could set our next hearing for Wednesday, May 3, at 3:00 p.m. [Mr. Hill and Mr. Turner agreed to that date and time.]

MR. SPEAKER SMITH: Also, Your Honor, I wonder if it would be possible for representatives from the Justice Department to come down and work with us on this.

MR. TURNER: Your Honor, Mr. Piper and I would be happy to make ourselves available for this purpose.

MR. SPEAKER SMITH: Could you come down to Atlanta next Tuesday? We would have the preliminary work done by then.

MR. TURNER: That would be fine. We would be happy to come down to Atlanta on Tuesday.

THE COURT (Judge Bell): All right, we will have our opinion prepared and get it out to you tomorrow. We will set the next hearing for 3:00 on Wednesday, May 3. We will now take up the Senate case.

[The foregoing transcript prepared pursuant to Rule 10(c), F.R.A.P.]

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

INTERIM REPORT TO THE COURT

[Filed April 18, 1972; R. 337]

1. Pursuant to the request of the Court, this report has been prepared following consultations between attorneys for the United States and for the State of Georgia. The report is based on these consultations and on 1970 census population data, by race, for the areas in question.

2. The plaintiff United States represents that the following ten multi-member districts (containing 27 members of the 180-member House) in Georgia's March 9, 1972 House reapportionment plan do not contain cognizable racial minorities within the meaning of the law. (Each has a non-white population percentage of less than 10 percent.)

1972 District #	(1971 District #)	No. Members	Population (1970 Census) Non-white	(%)	Total
1	(1)	2	2397	(4.68)	51,206
4	(4)	2	677	(1.32)	51,288
6	(6)	2	2346	(4.65)	50,496
8	(8)	3	5822	(7.60)	76,602
9	(9)	3	6174	(8.09)	76,333
19	(16)	3	7067	(6.91)	102,341
20	(17)	3	1618	(1.58)	102,170
21	(18)	2	8685	(4.25)	204,511
56	(46)	3	984	(1.28)	76,784
68	(55)	4	4765	(4.76)	100,000

The United States Attorney General will not object under Section 5 of the Voting Rights Act of 1965 if the above-designated multi-member districts remain in the

new House reapportionment plan to be formulated by the General Assembly pursuant to the decree of this Court.

3. The United States further agrees that although the following six multi-member districts (containing 13 members of the 180-member House) contain larger non-white populations which probably constitute cognizable racial minorities, the non-white population is so diffused that we conclude there is no significant dilution of voting strength attributable to multi-member districting:

1972 District #	(1971 District #)	No. Members	Population (1970 Census) Non-white	(%)	Total
13	(12)	3	18,426	(24.11)	76,416
64	(51)	2	8,437	(16.47)	51,236
67	(54)	2	12,898	(25.42)	50,746
116	(96)	2	11,910	(23.10)	51,563
123	(101)	2	13,163	(25.82)	50,973
127	(104)	2	12,134	(23.34)	51,977

Also, because of the relative complexity of further redistricting Fulton County for the 1972 elections, and because of the apparently minimal adverse racial effect from the existing Districts there, the United States will not object under Section 5 to leaving those districts (including District 43—the three at-large Fulton County members) unchanged in the new plan to be developed.

4. The remaining fifteen multi-member districts (containing 41 members of the 180-member House), in the opinion of the United States, have significant and cognizable nonwhite population concentrations whose inclusion in a multi-member district, in the context of numerical posts and a majority-win (runoff) requirement, would occasion a dilution or abridgment of voting rights on account of race or color. The United States therefore re-

quests the Court to direct the General Assembly, pursuant to the proposed guidelines set out below, to subdivide into single-member districts the following fifteen multi-member districts for use in the 1972 (and future) elections:

1972 District #	(1971 District #)	No. Members	Population (1970 Census) Non-white	(%)	Total
62	(49)	3	14,714	(19.05)	77,225
65	(52)	3	24,851	(31.88)	77,957
74	(61)	2	17,939	(35.19)	50,974
76	(78)	2	20,096	(40.67)	49,408
77	(64)	2	23,206	(45.08)	51,477
85	(71)	2	8,466	(11.19)	75,672
86	(72)	2	29,441	(37.84)	77,806
87	(73)	2	37,910	(24.70)	153,478
89	(75)	6	53,524	(35.30)	151,640
102	(82)	3	23,474	(30.56)	76,806
114	(94)	4	37,495	(36.30)	103,301
115	(95)	3	28,935	(38.24)	75,669
122	(100)	2	16,724	(32.69)	51,156
124	(102)	3	24,494	(32.31)	75,806
128	(105)	2	12,534	(24.81)	50,528

5. The existing multi-member districts can be internally subdivided, with no "domino effect" on other districts. By definition, each of the multi-member districts contains the right number of people needed for subdivision into single-member districts each having an "ideal population" from a one-man, one-vote standpoint.

In subdividing the multi-member districts, the General Assembly should employ the following guidelines:

(a) Single-member districts should be utilized exclusively.

(b) The new districts should each be compact and contiguous.

(c) The racial effect of each subdivision should be affirmatively considered; that is, Fifteenth Amendment rights should be affirmatively protected.

(d) Areas of nonwhite population concentration should not be unnecessarily divided between different districts.

(e) The 1970 Census population, by race, shall be calculated for each proposed new single-member district and shall be furnished by the defendants with the proposed new plan for the use of the Court and the parties in reviewing the new plan.

In fashioning guidelines for the General Assembly, the Court should consider recent cases dealing with the (not necessarily racial) requirements of the Fourteenth Amendment. Specifically, the Court should consider whether leaving multi-member districts in some areas, but not in other, similarly-situated areas, would meet the requirements of the Equal Protection Clause in the absence of a rational justification by the State for such differing treatment. See *Dunston* v. *Scott*, No. 2666-Civil (E.D.N.C., Jan. 10, 1972), and *Graves* v. *Barnes*, No. A-71-CA 142 (W.D. Texas, Jan. 1972). Perhaps the amicus brief to be filed by Jimmy R. Jones, Howard Kaylor, and J. T. Fry will be of assistance to the Court in this connection.

If the Court includes such Fourteenth Amendment guidelines to the legislature, any further subdivision of multi-member districts which might then be indicated

could be accomplished either before or after the 1972 elections.

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ATTORNEYS FOR THE
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OPINION AND ORDER OF THE DISTRICT COURT:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 16373

UNITED STATES OF AMERICA
V.
THE STATE OF GEORGIA, ET AL.

[Filed April 19, 1972; R. 353]

BEFORE: BELL, Circuit Judge; O'KELLEY, District Judge; and FREEMAN, District Judge

PER CURIAM

ORDER

The Acting Attorney General of the United States brings this action under Section 12(d) of the Voting Rights Act of 1965 [42 U.S.C. §1973j(d)] alleging a violation of Section 5 of the Act [42 U.S,C. §1973c]. Section 5 requires that either the Attorney General or the United States District Court for the District of Columbia approved the enactment of "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The Attorney General here alleges that the 1972 Georgia House reapportionment plan[1] was rejected by the Attorney General

[1] 1972 Act No. 877.

under Section 5 within the required 60-day statutory period and asks that this three-judge court, convened pursuant to 28 U.S.C. §2284, enjoin the State from proceeding to hold elections under the current reapportionment plan.

In 1971, the State of Georgia reapportioned its Congressional, State Senate and State House districts and presented its proposed plans to the Attorney General for Section 5 review. The Attorney General requested additional information as to all three plans and such information was furnished by the State. Thereafter, objections were made by the Attorney General as to portions of each of the plans. As a result, new Congressional and Senatorial plans were subsequently adopted by the General Assembly and were approved by the Attorney General. Although the State of Georgia adopted a new House plan in response to the Attorney General's first objection, that plan failed to eliminate the features of the first plan [i.e., multi-member districts, numerical posts and majority runoffs] to which the Attorney General had objected. For that reason, the Attorney General rejected this second House plan and subsequently, filed this action.

The legislative history of the Voting Rights Act does not clearly indicate that Congress intended Section 5 to apply to reapportionment acts. In view of *Allen v. State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969) and *Perkins v. Matthews*, 400 U.S. 379, 27 L.Ed.2d 476, 91 S.Ct. 431 (1971), this Court holds that Section 5 is applicable to such plans. Moreover, this reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, re-

places single-member districts with multi-member districts. The State's contention to the contrary is not well-founded.

Therefore, under the Voting Rights Act, the sole question before this Court is whether this plan, having been presented to the Attorney General for review, was rejected by him within 60 days. If so, this Court, without determining the merits of the State's proposed plan, must enjoin the State from operating under it.

In looking at the timetable of events in this case, we find that the Attorney General objected to the State's plan within the requisite 60 days. The first House reapportionment plan was submitted to the Attorney General on November 5, 1971. By letter dated November 19, 1971, the Attorney General requested further information from the State to aid in his Section 5 review. At that time, the Attorney General advised the State that the 60-day period for objection would commence running when the additional information was received by the Justice Department. That additional information was received on January 6, 1972 (more than 60 days after the State first submitted its plan), and the United States made its objection to the plan on March 3, 1972. Since the Attorney General's objection of March 3, 1972, was made within 60 days of his receipt of the additional information, we find that there was compliance with the 60-day time limit by the Attorney General. Likewise, the Attorney General's March 24, 1972 objection to the second House reapportionment plan dated March 9, 1972 was within the 60-day period. The Court will not allow the State to withhold additional information sought by the Attorney General until after the 60-day period has elapsed and thereafter contend that the Attorney General failed to object within the statutory period.

The 1971 and 1972 plans were disapproved by the Acting United States Attorney General. The State cannot revert to its previous apportionment statutes[2] since this Court has already declared that the State is malapportioned thereby and has ordered the State to reapportion.[3]

This Court specifically does not pass on the merits of the Georgia reapportionment plan.[4] We determine, however, that the Attorney General had jurisdiction over the matter and that within the proscription of Section 5, he disapproved Georgia's reapportionment plan. We further find that Section 5 of the Voting Rights Act is constitutional as applied.[5] Therefore, while retaining jurisdiction of this matter, the Court hereby enjoins the State of Georgia from proceeding to hold elections under the present reapportionment plan. The Speaker of the Georgia House of Representatives was present in Court and announced that the General Assembly would comply with the Court's Orders. Also, the legal aide to the Governor indicated that a Special Session of the General Assembly would be called immediately.

The Court will reconvene at 2:00 P.M. on May 3, 1972, to review any plan submitted by the State of Geor-

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[2] Ga. Laws 1968, p. 209.

[3] *Toombs v. Fortson*, 277 F.Supp. 821 (N.D. Ga. 1967).

[4] An Amicus Curiae Brief has been filed in this case making a 14th Amendment attack on the 4th district. The Acting Attorney General also points out 'Equal Protection' problems as to multi-member districts in general and a separate complaint has been filed making a 14th Amendment attack on the 56th Senatorial District in DeKalb County. The Court has also received correspondence and complaints about other districts and gerrymandering. One of these was from the Ordinary of Paulding County. This Order does not pass on these questions.

[5] Cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769.

gia or in the alternative to hear argument as to such action as may be required by the Court.

IT IS SO ORDERED this 19 day of April, 1972.

[Signatures omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 72-75

Georgia et al.,

Appellants,

v.

United States

[Filed October 24, 1972]

APPEAL from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 16, 1972

72-75

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[illegible]R., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and Member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, and MELBA WILLIAMS, Members of the State Election Board,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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July, 1972

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IN THE

Supreme Court of the United States

October Term, 1972

No.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and Member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, and MELBA WILLIAMS, Members of the State Election Board,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Northern District of Georgia, entered on April 19, 1972, enjoining the State of Georgia from holding elections under the 1972 and 1971 reapportionment acts for its House of Representatives. Appellants submit this Statement to show that the Supreme Court has jurisdiction, and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is not yet reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was instituted on behalf of the United States based upon Sections 5 and 12(d) of the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 42 U.S.C. §§ 1973c and 1973j(d), to enjoin the State of Georgia and the other appellants (defendants) from holding elections pursuant to the reapportionment acts for the House of Representatives adopted by the Georgia General Assembly on March 9, 1972, and October 14, 1971.

A three-judge court was sought and convened, based upon 28 U.S.C. 2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The injunction of the three-judge District Court was entered on April 19, 1972, and was stayed by this Court on April 21, 1972 (No. A-1106). Notice of Appeal was filed in the District Court on May 17, 1972 (Appendix C).

The jurisdiction of this Court to review that order and decision by direct appeal is conferred by 28 U.S.C. § 1253 and 28 U.S.C. § 2101(b), as well as Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c). The decision in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), sustains the jurisdiction of this Court to review this case on direct appeal.

STATUTES AND REGULATIONS INVOLVED

Section 4 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973b), which provides the formula for determination of which States and political subdivisions are subject to the Act, is set forth in Appendix B hereto.

Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973c), the statute directly involved in this appeal, provides as follows:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, prac-

tice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

The Attorney General adopted "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" which were printed in the Federal Register (Vol. 36, No. 176—Friday, September 10, 1971, pp. 18186-18190). Two provisions thereof directly involved in this appeal are as follows:

"§ 51.18 Obtaining information regarding submissions.

(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission."

[The provisions of § 51.10(a), referred to in the above

quotation, are lengthy, include by reference the provisions of § 51.10(b), and both are set forth in Appendix B.]

"§ 51.19 Standard for decision concerning submissions.

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

Other pertinent provisions of the Attorney General's Procedures ("Authority", § 51.3, § 51.10, § 51.26a) are set forth in Appendix B.

QUESTIONS PRESENTED

This appeal raises four questions, all relating to Section 5 of the Voting Rights Act of 1965, and each dependent upon an affirmative answer to the preceding question or questions.

1. Is Section 5 of the Voting Rights Act applicable to State legislative reapportionment acts, and if so, is Section 5 constitutional as thus applied?

2. Does Section 5 empower the U.S. Attorney General to disapprove the use of multi-member legislative districts, in combination with designated posts and the majority (runoff) election requirement, when a State subject to Section 5 (Georgia) was using all three prior to November 1, 1964 (the effective date of Section 5); i.e. can the Attorney General disapprove an election system, in principle, when there has been no change, in principle, in such election system?

3. Does Section 5 empower the Attorney General to disapprove a State law which he does not find to be discriminatory, but about which he says: "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting"; i.e., about which the Attorney General is unable to reach a decision?

4. Does the Attorney General have the power to extend the 60 day time limit Congress placed on him in Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

Following receipt of the 1970 Census, the Georgia General Assembly, one of the defendants herein, met in extraordinary session in the fall of 1971, to reapportion its legislative and congressional districts. The 1971

reapportionment act for the Georgia House of Representatives was submitted to the United States Attorney General, with explanatory maps and data, on November 5, 1971. On November 19, 1971, the Attorney General requested additional information, which was supplied on January 6, 1972.[1]

On Friday, March 3, 1972 (approximately 120 days after the November 5 submission, appellants contend), the U.S. Attorney General objected to the combination of multi-member districts, numbered posts and majority (runoff) requirement, saying:

> "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This objection was received by the General Assembly on Monday, March 6, at which time the legislature had only four days remaining in its 1972 regular (40 day) session. In those four days, the House of Representatives divided such multi-member districts into single member districts as it was able to (dividing 18 multi-member districts and leaving 32). It also adopted a resolution, addressed to the Attorney General, pointing out that it had not "changed" in its use of multi-member districts, designated posts, and majority (runoff) re-

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[1]The District Court stated that this additional information was "withheld" by the State until the 60-day period elapsed. As will be seen, the record is void of any evidence whatsoever that the State "withheld" the information. The United States did not even contend that it was "withheld". It took from November 19, 1971, to January 6, 1972, working Thanksgiving and during the Christmas holidays, to program the University of Georgia computer to obtain the mass of information requested by the Attorney General; e.g., "The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate districts, and for the old (1964) and new (submitted) Congressional districts."

quirement. The amended House reapportionment act (1972) also was submitted to the Attorney General, and was objected to by him on March 24, 1972, on the ground that it continued to use multi-member districts, numbered posts and majority (runoff) requirement.

The State of Georgia commenced using multi-member districts in its House of Representatives as early as 1880 (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51). It began designating posts in multi-member districts in Fulton County in 1925 (Ga. Laws 1925, p. 205), and as more and more such local laws were enacted, a state-wide designated post law was adopted in 1953 (Ga. Laws 1953, Nov. Sess., p. 269; Ga. Code Ann. § 47-119; see also Ga. Laws 1964, Ex. Sess., p. 26 at p. 89, approved June 24, 1964). Georgia's majority (runoff) election requirement, which had commenced as to some offices as early as 1917 (Ga. Laws 1917, pp. 183-184), was made applicable to legislators in primaries in 1962, and in elections in 1964 (Ga. Laws 1962, p. 1217 at p. 1218; Ga. Laws 1964, Ex. Sess., p. 26 at pp. 174-175, approved June 24, 1964)[2].

Thus, prior to November 1, 1964, the effective date of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), Georgia was and had been using multi-member districts, designated posts and the majority (runoff) election requirement as to its House of Representatives. The Attorney General objected to Georgia's use of an election system which has not changed.

This suit was instituted March 27, 1972, in the United

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[2]See *Bond v. Fortson*, 334 F.Supp. 1192 (N.D. Ga. 1971), aff'd 404 U.S. 930 (1971).

States District Court for the Northern District of Georgia seeking to enjoin the State from implementing its reapportionment acts of 1971 and 1972. Defendants raised four special defenses, which defenses appear as the questions presented in this appeal.

Hearing on those four questions was held on the afternoon of April 14, 1972. The court reconvened on the afternoon of April 18, announced that the State's four defenses would be overruled, called for discussion as to the relief to be granted, and received the Interim Report of the Government.[3]

In its Interim Report, the Government withdrew its objection to 17 multi-member districts it previously had objected to, retaining its objection as to 15 such districts. This corrective maneuver came too late to be acted upon by the General Assembly, which had already adjourned. Moreover, the Government volunteered that the District Court should consider requiring that all multi-member districts be subdivided, even those 17 not then objected to.

The District Court expressed the view at the April 18 hearing that if the 17 districts not then objected to by the Justice Department were subdivided, the multi-member question would be moot, and that it would be risky to have a special session of the legislature, to commence

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[3]Appellants do not consider that the United States of America, except as a legal entity, instituted this action. We do not consider that the United States Attorney General, occupied with many matters, disapproved Georgia's reapportionment plans. (He did not sign the letters of disapproval.) Thus, plaintiff-appellee will be referred to herein occasionally as the Government, and the Attorney General as the Justice Department, in accord with the facts of the case.

April 24, and not subdivide those 17 districts (Transcript, pp. 21-23).

The order of the District Court was issued on April 19, 1972. The Court did not rule on the Government's suggestion that all multi-member districts be subdivided (see Appendix A, footnote 4). It did, however, enjoin the State from conducting elections under the 1971 and '72 House of Representatives reapportionment acts. Unsure of how much would be required, the General Assembly prepared to convene in extraordinary session on April 24, 1972.

This Court granted a stay of that injunction on April 21, 1972 (No. A-1106), and the Government's motion to vacate the stay was denied on May 5, 1972.

(In a companion case, *Millican v. Fortson*, the District Court ordered reapportionment of the Georgia Senate, which order was stayed by this Court, No. A-1105, also on April 21, 1972. The Jurisdictional Statement in the appeal of that case is being filed simultaneously with the filing of this one.)

THE QUESTIONS ARE SUBSTANTIAL

1. Is Section 5 of the Voting Rights Act Applicable to Reapportionment, and if so, Is It Constitutional as Applied?

The primary purpose of this appeal is to determine whether Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) is applicable to State legislative reapportionment acts, and if so, whether Section 5 is constitutional as applied. This question is of vital importance to the states covered by Section 5, Georgia, Alabama, Louisiana, Mississippi, South Carolina and

Virginia. It is also of vital importance to Arizona, California, Hawaii, Idaho, New York, North Carolina and Wyoming, which have political subdivisions subject to Section 5. The latter States could have their legislative reapportionment plans upset by failing to submit their reapportionment plans to the Justice Department (and being challenged as in *Allen v. State Board of Elections*, 393 U.S. 544), or by failing to convince the Justice Department that their reapportionment plans do not have a discriminatory racial effect on voting in the affected political subdivisions.

In *Allen v State Board of Elections*, 393 U.S. 544 (1969), this Court expressly declined to decide whether Section 5 is applicable to reapportionment, saying (393 U.S. at 569):

> "Also, the question of whether § 5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principle involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict."

The question properly left unanswered in *Allen* is the primary question in the case at bar.

In *Allen*, the Government took the position that the applicability of Section 5 to reapportionment need not be decided in that case and, moreover, that the Court's decision of *Allen* would not be tantamount to concluding that Section 5 did apply to reapportionment (Brief of the United States in *Fairley v. Patterson*, decided with

Allen, supra; brief pages 22, 24). Yet the Government now contends that *Allen, supra,* and *Perkins v. Matthews,* 400 U.S. 379 (1971), made Section 5 applicable to reapportionment.

Appellants submit that the legislative history of the 1965 Voting Rights Act shows that Congress did not intend that it apply to reapportionment. See *Allen, supra.* If Congressmen had thought that the Act applied to congressional redistricting, they certainly showed an unusual lack of interest in the subject.

Moreover, one of the drafters of the '65 Act, Assistant Attorney General David L. Norman, testified before a Congressional subcommittee that before *Allen* and *Perkins:* "We didn't formerly think that reapportionment as such had to be submitted, or annexation." (Hearings before the Civil Rights Oversight Committee on the Enforcement of the Voting Rights Act, pp. 5, 6, 68, 1971.) Mr. Norman's testimony demonstrates the importance of the questions presented by this appeal. He testified as follows (Ibid at 7):

> "Our experience in the enforcement of Section 5 shows a considerable increase now in the number of submissions from States and political subdivisions, which are covered by the Voting Rights Act.
>
> This is largely, I think, a consequence of the Supreme Court holdings in two very important cases, one this year and one in 1969. More and more changes are covered by Section 5, so that now, for example, matters of reapportionment, redistricting, and even matters of annexation must be submitted either to the District Court for the District of Columbia for a declaratory judgment, or in the alternative, to the Attorney General of the United States.

> That fact, coupled with the 1970 decennial census which necessitates reapportionment and redistricting almost everywhere, has led to a substantial increase in the submissions to the Attorney General."

The "administrative problems" referred to by the Court in *Allen* have arisen. There are needless conflicts and pressures between the District Courts and the Attorney General's office in the reapportionment field. A State adopts a reapportionment plan and submits it to the Justice Department. A citizen's suit is filed in the local District Court alleging either too much deviation from one man - one vote, or racial gerrymandering, or both. The plan is not effective until approved by the Justice Department. Thus the court may delay decision for 60 days (or more) to see if Justice disapproves the plan. The court is likely to want to delay decision, apprehending that if the court approves the plan and Justice disapproves it, the court will look bad. The Justice Department, on the other hand, feels some pressure to disapprove the plan for fear that if they approve it and the court then disapproves it, the Department will look bad. Yet what would happen if the court approves the plan and Justice disapproves? Is the plan in effect under *Connor v. Johnson*, 402 U.S. 690 (1971), or is the plan not in effect pursuant to *Perkins v. Matthews*, 400 U.S. 379 (1971)? The conflicts and pressures between the District Courts and the Justice Department can be avoided by this Court's decision of this case.

Reapportionment is, in the first instance, a matter for State legislatures, and secondly, a matter for the courts. *Burns v. Richardson*, 384 U.S. 73, 85 (1966). There is no room for the federal executive branch. Unlike a

court, the Attorney General cannot formulate a reapportionment plan, nor withhold relief where an election is imminent.

The inability of the Attorney General to formulate a plan, and to withhold relief until after an election, causes serious problems, which were avoided in this case only by resort to the court. As was stated to the court below by Mr. Harry Piper, Justice Department attorney, Georgia adopted two reapportionment plans, neither of which was found to be satisfactory. Mr. Piper continued, saying (Transcript, p. 13):

> "We have asked that the new plan be submitted to this Court, or that the Court draw a new plan itself. Because of the time element, we couldn't keep having plans go back and forth between Georgia and Washington like ping-pong balls."

Ping-pong may be a fine beginning point for international relations but it is undignified in our federal system. Without this suit, Georgia could still be adopting and submitting reapportionment plans, in its effort to satisfy Washington, right through the campaign and election. If litigation is the best solution, then the solution should be applied sooner rather than later. The federal courts, which are properly equipped to deal with reapportionment, should be allowed to proceed without interference from the federal executive branch.[4]

This Court has not held that reapportionment acts are subject to Section 5. Such a decision was expressly left to another case. *Allen, supra,* 393 U.S. at 569.

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[4]The simplest solution would be for the covered States to abdicate their duties and let the District Courts formulate reapportionment plans, thereby avoiding the Justice Department altogether. (*Connor v. Johnson,* 402 U.S. 690).

We respectfully submit that this case is the one. Most Section 5 cases are brought by private litigants against a State (see *Allen*, *Fairley* and *Perkins*, *supra.*). The United States is a party to this case and can explain (defend) in person its contention that Section 5 applies to reapportionment, and its procedures used in evaluating reapportionment plans under Section 5.

If Section 5 is to be applied to reapportionment, the question remains, is it constitutional as applied? The "as applied" question was not decided in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

The facial constitutionality of the Voting Rights Act and of Section 5 was upheld in *Katzenbach*. But the selective coverage formula (Section 4) was upheld as being appropriate legislation authorized by the 15th Amendment; i.e., a rational means of attacking the problem of voter registration tests and devices found to exist in the covered states, 383 U.S. at 325, 329-331. Reapportionment is a national problem, not limited to the covered states, and the appropriate legislation and rational means tests which authorized the selective coverage formula are not applicable to national problems such as reapportionment.

Moreover, the facial validity of the prior approval requirements of Section 5 was upheld in *Katzenbach* as a means of preventing the covered states from resorting "to the extraordinary stratagem of contriving new rules" in the face of adverse court decrees (383 U.S. at 334-335). States do not reapportion as an extraordinary stratagem contrived to avoid court decrees. The opposite is true. States reapportion to comply with court decrees, not to avoid them. Almost invariably, reappor-

tionment plans are litigated, whereas the denial of an individual's right to register to vote rarely was. The reasons announced in *Katzenbach* for upholding Section 5 simply do not exist in the field of reapportionment.

Let us assume for the moment that Congress enacted a law, entitled the Reapportionment Approval Act of 1965, requiring certain covered states to submit their reapportionment acts to either the District Court in Washington or to the Justice Department for approval. Would that be appropriate legislation as authorized by the 15th Amendment? We submit that the answer clearly is "No". Yet the court below in effect has held that such an Act would be valid.

Such an Act clearly would not be "appropriate" under the 15th Amendment and clearly would violate the constitutional guarantee to the States of a Republican Form of Government, by suspending State legislative apportionment acts, pending approval, and by authorizing disapproval of such acts. Compare *Bauers v. Heisell*, 361 F.2d 581 (C.A. 3, 1966).

Whether or not Section 5 is applicable to reapportionment, and constitutional if applicable, these questions are nevertheless worthy of decision by this Court. The covered states and the other affected states are entitled, we respectfully submit, to have such questions decided by the highest authority.

2. Does Section 5 Empower the Attorney General to Disapprove an Election System Which Has Not Changed?

If Section 5 of the 1965 Voting Rights Act is applicable to reapportionment and if it is constitutional at

thus applied, then the interpretation and construction of Section 5 become critical to the thirteen covered and affected States.

The first of these questions involves the scope of review by the Justice Department.

It is clear beyond doubt that the Justice Department objected to Georgia's use of multi-member districts. Mr. Harry Piper, speaking for the Government, stated to the court below (Transcript, p. 11):

> "The United States does not contest that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan."

It is equally clear that Georgia was using multi-member districts continuously from 1880 to date (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51), and was using both designated posts and majority election prior to November 1, 1964.

It is also clear that Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." In other words, Section 5 suspends only "new" voting regulations. *South Carolina v. Katzenbach, supra,* 383 U.S. at 334. It requires submission of any "change" in election laws. *Allen v. Board of Elections,* 393 U.S. at 549.

It should be noted that we have said that Section 5 clearly suspends, and requires submission of, "new" vot-

ing laws; i.e., "changes" in election laws. We contend that Section 5 is equally clear that it authorizes the Justice Department to disapprove only the "change", because, as was stated in *South Carolina v. Katzenbach, supra*, 383 U.S. at 335, the purpose of Section 5 was to prevent the contrivance of new rules to evade the suspension of literacy tests. However, the Justice Department interprets Section 5 differently. They contend that the "change" only "triggers" the requirement of submission and ". . . does not necessarily limit the standards of review or the permissible range of objection resulting from such review." (Plaintiff's Brief to the District Court, pp. 12-13.)

Now, if Section 5 does not limit the Justice Department's "standards of review" or its "range of objection", then the covered and affected States certainly should be advised as to what does.

The Justice Department's contentions made it imperative that Georgia raise the question: Does Section 5 empower the Attorney General to disapprove a law which has not "changed" within the meaning of that Section?

In the case at bar, the Justice Department notified the Georgia General Assembly, in the closing days of its session, that the use of multi-member districts, in combination with the designation of posts and majority elections, was disapproved. The Justice Department did not say to the General Assembly that multi-member districts numbered 62, 65, 74, 76, 77, 85-89, 102, 114, 115, 122, 124 and 128 were disapproved as being new multi-member districts, or as being multi-member districts with changed boundaries, or as having had the number of

members changed. By disapproving the use of multi-member districts as such, the Justice Department told the Georgia General Assembly to subdivide, into single member districts, all multi-member districts, including 17 which the Government later conceded in court either contained no cognizable racial minorities at all or had such dispersed minorities that the subdividing of those districts would not increase their voting strength.

The Justice Department objected to the use of multi-member districts in principle, notwithstanding *Whitcomb v. Chavis*, 403 U.S. 124 (1971). They objected to the system, not to its application in particular changed circumstances. Although the application of many multi-member districts had changed, the use of multi-member districts as an election system has not changed (since 1880). Thus, Georgia seeks review of the scope of the Attorney General's power under Section 5.

Glynn County, Georgia, offers a perfect example of the point we hope to make. Glynn County was a 2 man multi-member district in 1961 (Ga. Laws 1961, p. 111), a 2 man multi-member district in the reapportionment of 1965 (Ga. Laws 1965, p. 133), a 2 man multi-member district in the reapportionment of 1967 (Ga. Laws 1967, p. 192), a 2 man multi-member district in the reapportionment of 1968 (Ga. Laws 1968, p. 214), a 2 man multi-member district in the reapportionment of 1971, and a 2 man multi-member district in the reapportionment of 1972. Not since 1941 has there been any change whatsoever in the 2 man multi-member representation of Glynn County in the Georgia House of Representatives (see Ga. Laws 1951, pp. 26-27, Ga. Laws 1941, pp. 348-349), yet that district was disapproved by the Justice Department.

The Attorney General's objection to the use of multi-member districts, as such, is invalid, we submit, because Georgia was using multi-member districts, as such, in 1961, and continued to do so, with District Court approval, throughout the 1960's and in its 1971 and '72 reapportionment plans.

Permit us momentarily to assume a hypothetical situation for the purpose of illustrating the awesome scope of the power claimed by the Justice Department. The Georgia House of Representatives had 205 members in 1961. It had 205 members in the reapportionment of 1965. Assume that the 1972 reapportionment plan called for 205 members, but that the district lines were changed considerably as compared to 1961 and 1965. Under the Justice Department's interpretation of Section 5, the Attorney General could object to the continued use of 205 members because the change in district lines "triggered" the requirement of submission, but the Attorney General was not limited to objecting to that which had "changed". *Cf. Sixty-Seventh Minnesota State Senate v. Beens*, 92 S.Ct. 1477 (1972).

We submit that the Justice Department exceeded its authority in objecting to laws as to which there had been no change. We submit, moreover, that this Court should make the determination if the Justice Department is to be allowed to make such objections. We further submit that the covered and affected States deserve to know the scope of the Justice Department's power of review of state voting and election law changes.

3. Does Section 5 Empower the Attorney General to Disapprove a State Law Which He Does Not Find to Be Discriminatory, But About Which He Is Unable to Reach a Decision?

In his March 3, 1972, letter disapproving Georgia's 1971 reapportionment plan, Assistant Attorney General David L. Norman wrote as follows:

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This indecisive policy of denial is wrong, we respectfully submit. It is based upon Section 51.19 of the Attorney General's regulations (quoted above). However, those regulations have no statutory basis.

Although the Attorney General's regulations (§ 51.19) assert that in reviewing voting law changes, he is performing a judicial function, the Attorney General cannot set himself up as a court. Const. Art. III, Sec. 1 and Sec. 2,

In *Allen v. Board of Elections, supra,* 393 U.S. at 549, this Court said:

> "The Attorney General does not act as a court in approving or disapproving the state legislation."

If he were a court, the Attorney General could im-

pose a burden of proof on the submitting states, and he then perhaps could disapprove submissions (as his regulations provide) if he is unable to reach a decision within 60 days. But he is not a court, *Allen, supra,* and Congress could not and did not, in Section 5 or elsewhere, establish him as a court. Const. Art. III, Sec. 1, and Sec. 2.

If we are wrong in our contention and if the Attorney General is indeed a court, ". . . a surrogate for the District Court for the District of Columbia when he passes on Section 5 submissions . . .", as counsel for the Government argued to the court below (Transcript, p. 9), then as Government counsel argued, "If that be so, the burden of proof should not be different just because the state chooses to go through the Attorney General instead of through the District Court. . . ." (Transcript, p. 9). But, if the Government is correct in its contentions and regulations, then the *Allen* statement (quoted above) was wrong, and *Katzenbach, supra,* was wrong and Section 5 is unconstitutional as an attempt to ordain and establish the Attorney General as a court, with power extending to cases in law arising under the constitution and laws, to which the United States is one party and a State is the other party, all in violation of Article III of the Constitution.

In *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971), the Court reiterated its insistance that the challenger carry the burden of proof that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial elements. The Justice Department has resorted to a new regulation (§ 51.19) for the purpose of perpetuating discrimination against the covered States, in the face of *Whitcomb.*

We submit that the validity of the Justice Department's judicial burden of proof standard, resulting in its indecisive denial policy, should be reviewed by this Court. In fact, we cannot imagine that the Justice Department does not want this issue, as well as the other questions to be raised on appeal, decided by this Court.

4. Does the Attorney General Have the Power to Extend the 60 Day Time Limit Congress Set in Section 5?

By letter dated March 24, 1972, the Justice Department disapproved the House of Representatives reapportionment plan adopted on March 9, 1972, the last day of the 1972 regular session. The ground for disapproval was Georgia's failure to satisfy the Justice Department's earlier objection to multi-member districts combined with designated posts and majority (runoff) election requirement.

If Section 5 is applicable to reapportionment and valid as applied, and if the burden of proof standard and indecisive denial policy are valid, then the March 9, 1972 reapportionment plan was timely disapproved and thus is suspended.

However, the reapportionment plan adopted at the 1971 special session was submitted, appellants contend, to the Justice Department on November 5, 1971. Its disapproval by letter dated March 3, 1972, was not within the 60 day time limit Congress placed on the Attorney General in Section 5, and hence the 1971 plan is in effect, appellants contend.

The Justice Department contends however that the 60 day time limit did not commence until January 6,

1972, by virtue of the Attorney General's regulations, Sections 51.18(a) and 51.10. If that be so, the March 3, 1972 objection was timely.

The Justice Department's argument assumes, however, the validity of the Attorney General's regulations, whereas none of the cited authorities (5 U.S.C. 301, 28 U.S.C. 509-510, 42 U.S.C. 1973c, and Chapter I of Title 28 of the Code of Federal Regulations) authorizes the Attorney General to extend, by regulation or otherwise, the 60 day limit fixed by Congress for the suspension of State election laws.

Section 5 itself provides that the covered and affected States may enforce changes in their voting laws if the change has been submitted to the Attorney General and he ". . . has not interposed an objection within sixty days after such submission. . . ." The purpose of the provision was to limit the time in which changes in voting laws were held in abeyance, and to expedite effectuation of those changes. *Allen v. Board of Elections, supra,* 393 U.S. at 549. If it had seen fit to do so, Congress could have put no time limit on the Attorney General, providing that a change would be effective when and if approved by him. Congress did not do so. Instead it enacted a time limit.

The Government has argued that Congress certainly did not expect that changes as complex as reapportionment plans could be reviewed within 60 days and without supplying the Attorney General with such other information as he might request. Our response to that argument is that Congress did not intend for the Attorney General to be reviewing reapportionment plans in the first place. If Congress did so intend, then the At-

torney General should ask Congress for additional time, and funds to employ researchers and statisticians to compile the information he wants. Section 5 is onerous enough without burdening the States with additional duties under it.

CONCLUSION

It is submitted that the District Court erred in its reading of *Katzenbach*, *Allen* and *Perkins* and in accepting the arguments of the Government. Moreover, it is submitted that the covered and affected States deserve the consideration of this Court, no matter what the outcome, on these issues of federal-state relationships. Even States not presently affected may be concerned in the future by extensions of the Voting Rights Act or similar uncommon exercises of power.

We believe that the questions presented by this appeal are substantial and that they are of such public importance as to warrant consideration by this Court.

Respectfully submitted,

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HAROLD N. HILL, JR.
Executive Assistant
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July, 1972

APPENDIX A

OPINION AND ORDER OF THE DISTRICT COURT:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 16373

UNITED STATES OF AMERICA

V.

THE STATE OF GEORGA, ET AL.

BEFORE: BELL, Circuit Judge; O'KELLEY, District Judge; and FREEMAN, District Judge

PER CURIAM

ORDER

The Acting Attorney General of the United States brings this action under Section 12(d) of the Voting Rights Act of 1965 [42 U.S.C. §1973j(d)] alleging a violation of Section 5 of the Act [42 U.S.C. §1973c]. Section 5 requires that either the Attorney General or the United States District Court for the District of Columbia approved the enactment of "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The Attorney General here alleges that the 1972 Georgia House reap-

portionment plan[1] was rejected by the Attorney General under Section 5 within the required 60-day statutory period and asks that this three-judge court, convened pursuant to 28 U.S.C. §2284, enjoin the State from proceeding to hold elections under the current reapportionment plan.

In 1971, the State of Georgia reapportioned its Congressional, State Senate and State House districts and presented its proposed plans to the Attorney General for Section 5 review. The Attorney General requested additional information as to all three plans and such information was furnished by the State. Thereafter, objections were made by the Attorney General as to portions of each of the plans. As a result, new Congressional and Senatorial plans were subsequently adopted by the General Assembly and were approved by the Attorney General. Although the State of Georgia adopted a new House plan in response to the Attorney General's first objection, that plan failed to eliminate the features of the first plan [i.e., multi-member districts, numerical posts and majority runoffs] to which the Attorney General had objected. For that reason, the Attorney General rejected this second House plan and subsequently, filed this action.

The legislative history of the Voting Rights Act does not clearly indicate that Congress intended Section 5 to apply to reapportionment acts. In view of *Allen v. State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969) and *Perkins v. Matthews*, 400 U.S. 379, 27 L.Ed.2d 476, 91 S.Ct. 431 (1971), this Court holds that Section 5 is applicable to such plans. More-

[1]1972 Act No. 877.

over, this reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, replaces single-member districts with multi-member districts. The State's contention to the contrary is not well-founded.

Therefore, under the Voting Rights Act, the sole question before this Court is whether this plan, having been presented to the Attorney General for review, was rejected by him within 60 days. If so, this Court, without determining the merits of the State's proposed plan, must enjoin the State from operating under it.

In looking at the timetable of events in this case, we find that the Attorney General objected to the State's plan within the requisite 60 days. The first House reapportionment plan was submitted to the Attorney General on November 5, 1971. By letter dated November 19, 1971, the Attorney General requested further information from the State to aid in his Section 5 review. At that time, the Attorney General advised the State that the 60-day period for objection would commence running when the additional information was received by the Justice Department. That additional information was received on January 6, 1972 (more than 60 days after the State first submitted its plan), and the United States made its objection to the plan on March 3, 1972. Since the Attorney General's objection of March 3, 1972, was made within 60 days of his receipt of the additional information, we find that there was compliance with the 60-day time limit by the Attorney General. Likewise, the Attorney General's March 24, 1972 objection to the second House reapportionment plan dated March 9, 1972 was within the 60-day period. The Court

will not allow the State to withhold additional information sought by the Attorney General until after the 60-day period has elapsed and thereafter contend that the Attorney General failed to object within the statutory period.

The 1971 and 1972 plans were disapproved by the Acting United States Attorney General. The State cannot revert to its previous apportionment statutes[2] since this Court has already declared that the State is malapportioned thereby and has ordered the State to reapportion.[3]

This Court specifically does not pass on the merits of the Georgia reapportionment plan.[4] We determine, however, that the Attorney General had jurisdiction over the matter and that within the proscription of Section 5, he disapproved Georgia's reapportionment plan. We further find that Section 5 of the Voting Rights Act is constitutional as applied.[5] Therefore, while retaining jurisdiction of this matter, the Court hereby enjoins the State of Georgia from proceeding to hold elections under the present reapportionment plan. The Speaker of the Georgia House of Representatives was present in Court

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[2]Ga. Laws 1968, p. 209.

[3]*Toombs v. Fortson*, 277 F.Supp. 821 (N.D. Ga. 1967).

[4]An Amicus Curiae Brief has been filed in this case making a 14th Amendment attack on the 4th district. The Acting Attorney General also points out 'Equal Protection' problems as to multi-member districts in general and a separate complaint has been filed making a 14th Amendment attack on the 56th Senatorial District in DeKalb County. The Court has also received correspondence and complaints about other districts and gerrymandering. One of these was from the Ordinary of Paulding County. This Order does not pass on these questions.

[5]Cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769.

and announced that the General Assembly would comply with the Court's Orders. Also, the legal aide to the Governor indicated that a Special Session of the General Assembly would be called immediately.

The Court will reconvene at 2:00 P.M. on May 3, 1972, to review any plan submitted by the State of Georgia or in the alternative to hear argument as to such action as may be required by the Court.

IT IS SO ORDERED this 19 day of April, 1972.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

I.

Section 4 of the Voting Rights Act of 1965, as amended; pertinent provisions of (42 U.S.C. § 1973b):

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard

and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this Section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum

of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) Definition of test or device.

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter. (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

II.

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, pertinent provisions of (Fed. Register, Vol. 36, No. 176, Sept. 10, 1971, pp. 18186-18190):

AUTHORITY: The provision of this Part 51 issued under 5 U.S.C. 301, 28 U.S.C. 509, 510 and section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as amended, 84 Stat. 315 (1970), Chapter I of Title 28, Code of Federal Regulations.

§ 51.3 Computation of time.

(a) The Attorney General shall have 60 days in

which to interpose an objection to a submitted change affecting voting.

(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of § 51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in § 51.18.

§ 51.10 Contents of submissions.

(a) Each submission shall include:

(1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.

(2) The date of final adoption of the change affecting voting.

(3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legislature, ordinance of city council, redistricting by election officials).

(4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

(1) A statement of the reasons for the change affecting voting.

(2) A statement of the anticipated effect of the change affecting voting.

(3) A statement identifying any past or pending litigation concerning the change affecting voting or related prior voting practices.

(4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted

the submitting authority may refer to the date of prior submission and identify the previously submitted changes.

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to

be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained in the publication of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates, by race, who have run for such office in the last two elections and the results of such elections.

(7) Evidence of public notice or opportunity for the public to be heard. In examining submissions, consideration may be given, where appropriate, to evidence of public notice and opportunity for interested parties to participate in the decision to adopt or implement the proposed change and to indications that such participation in fact took place, or to evidence of notice to the public that a submission has been made soliciting comment by the public to the Department of Justice. Examples of materials demonstrating public notice or participation include:

(i) Copies of newspaper articles discussing the proposed change.

(ii) Copies of public notices (and statements re-

garding where they appeared, e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups) which describe the proposed change and invite public comment or participation in hearings, or which announce submission to the Attorney General and invite comments for his consideration.

(iii) Minutes or accounts of public hearings concerning the proposed changes.

(iv) Statements, speeches, and other public communications concerning the proposed changes.

(v) Copies of comments from the general public.

(vi) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(8) Where information requested herein is relevant but not known and not believed to be available, submissions should so state.

(9) Where information furnished reflects an estimation, submissions should identify the individual and state his qualifications to make the estimate.

(10) Submissions should identify in general the source of any information they supply.

(11) When a submitting authority desires the Attorney General to consider any information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by stating the date and subject matter of the earlier submission and identifying the relevant information therein.

§ 51.26 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence, notations concerning conferences with the submitting authority or any interested individual or group and a copy of any letters from the Attorney General concerning his decision whether to object to a submission. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under § 51.12(c) shall not be included in the section 5 file. Investigative reports and internal memoranda shall not be included in the section 5 file.

APPENDIX C

(Filed in Clerk's Office May 17, 1972; Claude L. Goza, Clerk; By: PJE, Deputy Clerk)

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* V. THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, MELBA WILLIAMS, Members, *Defendants.*	CIVIL ACTION FILE NO. 16373

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Georgia, the General Assembly of the State of Georgia, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and members of the State Election Board William F. Blanks, M. M. Smith, Matthew Patton, Melba Williams, the defendants in the above styled case, hereby appeal to the Supreme Court of the United States from the order

holding Section 5 of the Voting Rights Act of 1965 to be constitutional and enjoining the State of Georgia from proceeding to hold elections to the House of Representatives under the present reapportionment plan, entered in this action on April 19, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1253.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

STATE OF GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MEMORANDUM FOR THE UNITED STATES

The United States instituted this action in the United States District Court for the Northern District of Georgia under Section 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973j(d), seeking to enjoin elections pursuant to the 1971 and 1972 reapportionment plans for the Georgia House of Representatives. Implementation of these plans was resisted on the ground that an objection had been properly interposed by the Attorney General under Section 5 of the Act, 42 U.S.C. 1973c, as he was "unable to conclude that the plan[s] [did] not have a discriminatory racial effect" (J.S. 21).

The material facts are not in dispute. In the autumn of 1971, the Georgia General Assembly reapportioned its legislative (state Senate and House) and congressional districts under three reapportionment plans which were submitted to the Attorney General of the United States on November 5, 1971, for Section 5 review.[1] On November 19, 1971, the Attorney General, pursuant to regulation (28 C.F.R. 51.1-51.29), requested additional information, deemed essential for a proper evaluation by the Department of Justice, for all three plans; this information was furnished by the State on January 6, 1972.

On March 3, 1972, the Attorney General interposed objections to various aspects of the plans. Based on these objections, new state senatorial and congressional plans were adopted by the Georgia General Assembly, and, upon resubmission to the Attorney General under Section 5, they were approved.

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[1] Section 5 provides that States and political subdivisions subject to that Section which "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *," shall before enforcement thereof obtain a declaratory judgment from the United States District Court for the District of Columbia that the new law, regulation or procedure is not racially discriminatory in purpose or effect, or alternatively, may submit the qualification, prerequisite, standard or procedure to the Attorney General for review. See J.S. 3-4.

On September 10, 1971, the United States Attorney General promulgated detailed Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, which serve as procedural and interpretative guidelines for the administration of Section 5. See J.S. 4-5; J.S. App. 8b-9b.

With respect to the 1971 reapportionment plan pertaining to the Georgia House of Representatives —which is involved here—the Attorney General's letter of objection stated in relevant part (J.S. 21):

> An analysis of several recent federal court decisions dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgment of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting.

In response to these objections, the Georgia General Assembly repealed the plan submitted on November 5, 1971, and adopted a revised reapportionment plan for the House of Representatives. The new plan eliminated only 18 of the previous 50 multi-member districts (J.S. 7), and failed to remove either the numerical post provision for candidates' qualification or the majority (runoff) requirement for election in primary and general elections. The House of Representatives, on March 9, 1972, also adopted a resolution formally declining to eliminate the features of the initial plan to which the Attorney General had objected.

The revised House reapportionment plan was then submitted to the Attorney General for Section 5 review; on March 24, 1972, the Attorney General

issued an objection, relying essentially on the same reasons that he had earlier stated with respect to the 1971 House reapportionment plan. The present action was commenced on March 27, 1972.

A three-judge court was convened to hear the matter, as required by Section 5 of the Act.[2] The State argued (1) that Section 5 of the Voting Rights Act of 1965 cannot constitutionally be applied to reapportionment Acts of state legislatures; (2) that the House reapportionment plans involved here were in any event not "changes" subject to the provisions of Section 5; (3) that the Attorney General did not apply the appropriate standard in reviewing the House plans submitted to him; and (4) that the objections interposed by the Attorney General were untimely.

Following a hearing, the district court held (J.S. App. 1a-5a) that Section 5 does apply to state reapportionment plans and, as so construed, is constitutional. Concluding that the plans involved here constituted "a change from prior Georgia procedures" (J.S. App. 3a), the court upheld the Attorney General's objections as both properly made and timely. It enjoined the state "from proceeding to hold elections under the present reapportionment plan" (J.S. 4a).

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[2] The Section reads in pertinent part (J.S. 4): "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

On April 21, 1972, this Court stayed the order of the district court (No. A-1106); a motion by the United States to vacate the stay was denied on May 5, 1972.

We think that the decision of the district court is correct. The language of this Court's opinion in *Allen* v. *State Board of Elections*, 393 U.S. 544, and *Perkins* v. *Matthews*, 400 U.S. 379, strongly supports the conclusion below that the review procedures provided in Section 5 apply with equal force to state reapportionment plans.[8] Moreover, it follows from *South Carolina* v. *Katzenbach*, 383 U.S. 301, that the statute, as so applied, is valid under the Constitution.

On the basis of this Court's decisions in *Allen* and *Perkins*, the Attorney General has consistently treated reapportionment plans submitted to him as generally subject to the requirements of Section 5. See 28 C.F.R. 51.4(c)(3). Whether he should continue to do so is a matter of the utmost importance, not only to the United States and the State of Georgia, but also to a number of other States and political subdivisions subject to Section 5. Pursuant to this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186, *Avery* v. *Midland County*, 390 U.S. 474, and

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[8] In view of *Allen* and *Perkins*, the State's contention that its House reapportionment plans were not "changes" within the meaning of Section 5 was, we submit, also properly rejected (compare *Whitcomb* v. *Chavis*, 403 U.S. 124).

In addition, we agree with the district court that the Attorney General, in interposing his objections, applied the appropriate standard (see 28 C.F.R. 51.19), and acted within the 60-day time limit (see 28 C.F.R. 51.18).

related cases, reapportionments and redistrictings regularly occur at both state and local levels, and compliance with Section 5 is a requirement for six States and all of their political subdivisions, as well as for more than 50 counties in other States.

The present case provides an appropriate opportunity for this Court to speak directly to substantial issues concerning the scope of Section 5 in matters of state reapportionment, and to settle whatever doubts may exist concerning the authority of the Attorney General to adopt procedures for the implementation of the statute.[4]

Accordingly, while we are in agreement with the decision of the district court, it is our view that the issues involved here warrant plenary consideration by the Court.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[4] Appellants have here challenged the regulatory procedures adopted by the Attorney General insofar as they relate to the burden of proof allocated to the submitting State and to the timing of the Attorney General's action.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-75

THE STATE OF GEORGIA, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLANTS

This is an appeal from an order of a three judge District Court for the Northern District of Georgia, entered on April 19, 1972, enjoining the State of Georgia from holding elections under the 1972 and 1971 reapportionment acts for its House of Representatives. Appellants are the State of Georgia, the Georgia General Assembly, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and William F. Blanks, M. M. Smith, Matthew Patton and Melba Williams, members of the State Election Board.

OPINION BELOW

The opinion of the three-judge District Court (A. 72) is not yet reported.

JURISDICTION

This suit was instituted on behalf of the United States based upon Sections 5 and 12(d) of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. §§1973c and 1973j(d), to enjoin the State of Georgia and the other appellants (defendants) from holding elections pursuant to the reapportionment acts for the House of Representatives adopted by the Georgia General Assembly on March 9, 1972, and October 14, 1971.

A three-judge court was sought and convened, based upon 28 U.S.C. §2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (A. 7).

The injunction of the three-judge District Court was entered on April 19, 1972 (A. 75-76), and was stayed by this Court on April 21, 1972 (No. A-1106). Notice of Appeal was filed in the District Court on May 17, 1972 (R. 370). Appellants' Jurisdictional Statement was filed on July 14, 1972, and probable jurisdiction was noted on October 16, 1972.

The jurisdiction of this Court to review the order and decision of the District Court by direct appeal is conferred by 28 U.S.C. §1253 and 28 U.S.C. §2101(b), as well as Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision directly involved in this case is the 15th Amendment, particularly Section 2, and in connection therewith, Sections 1, 2 and 4 of Article

IV, and the 9th and 10th Amendments. Sections 1 and 2 of Article III are also involved. All of these provisions are set forth in the appendix to this brief.

The statutes which are involved are Sections 4 and 5 of the Voting Rights Act of 1965 (as amended) (42 U.S.C. §1973 b, c), and 5 U.S.C. §301, and 28 U.S.C. §§509 and 510, set forth in the appendix to this brief.

The regulations involved are the "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" adopted by the United States Attorney General, 28 C.F.R. 51, particularly "Authority" and Sections 51.3(a),(b), 51.10, 51.18(a), 51.19, and 51.26(a), set forth in the appendix to this brief.[1]

QUESTIONS PRESENTED

This appeal raises four questions, all relating to Section 5 of the Voting Rights Act of 1965, and each dependent upon an affirmative answer to the preceding question or questions.

1. Is Section 5 of the Voting Rights Act applicable to State legislative reapportionment acts, and if so, is Section 5 constitutional as thus applied?

2. Does Section 5 empower the U.S. Attorney General to disapprove the use of multi-member legislative districts, in combination with designated posts and the majority (runoff) election requirement, when a State subject to Section 5 (Georgia) was using all three prior to November 1, 1964 (the effective date of Section 5); i.e. can the Attorney General disapprove an election

[1] To avoid confusion between the appendix to this brief and the single appendix, all citations in this brief to the appendix are references to the single appendix. For convenience, an index of the constitutional provisions, statutes and regulations involved in this case precedes the appendix in this brief.

system, in principle, when there has been no change, in principle, in such election system?

3. Does Section 5 empower the Attorney General to disapprove a State law which he does not find to be discriminatory, but about which he says: "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting"; i.e., about which the Attorney General is unable to reach a decision?

4. Does the Attorney General have the power to extend the 60 day time limit Congress placed on him in Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

This Court decided *Whitcomb v. Chavis*, 403 U.S. 124, on June 7, 1971.

In the fall of 1971, following receipt of the 1970 Census, the Georgia General Assembly met in extraordinary session to reapportion its legislative and congressional districts for the 1972 elections (Ga. Laws 1971, Ex. Sess., pp. 1-3). The three acts (House, Senate and Congressional) were submitted to the United States Attorney General, with explanatory maps and data, on November 5, 1971 (A. 32). The material submitted in connection with the House reapportionment act is shown by exhibit 6 to the complaint filed in this action (A. 19). The act showed on its face that it contained 105 districts, including 49 multi-member districts, for the 180 member House (R. 21-51). Both the new (1971) and old (1968) House reapportionment acts were submitted (R. 21, 56), with the available maps of the old and new districts (see Complaint exhibit 6, A. 19 at 21), and with the population variances for each new district (A. 20).[3]

On November 19, 1971, Mr. David L. Norman, As-

sistant Attorney General, Civil Rights Division, wrote the Georgia Attorney General, in pertinent part, as follows (A. 39):

"After a preliminary examination of the initial submission, this Department has determined that the data sent to the Attorney General are insufficient to evaluate properly the changes you have submitted. In accordance with Sections 51.10(a)(6) and 51.18 (a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (36 Federal Register 18186-18190, September 10, 1971), would you please assist us by providing this Department the following additional information:

"1. The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate districts, and for the old (1964) and new (submitted) Congressional districts.

"2. 1970 Census maps showing the precise district boundaries for any submitted State Senate or State House district which divides any county or city. (Such maps have already been submitted for the metropolitan areas of Atlanta, Savannah, Augusta, Columbus, and Cobb County for submitted House districts and for the metropolitan areas of Atlanta, Albany, Macon, Augusta, Savannah, and Columbus for submitted Senate districts).

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[3] The racial distribution within the districts was not submitted to the Attorney General on November 5, because, as explained to him (A. 19), the General Assembly had contracted with the Computer Center at the University of Georgia to assist in establishing equal districts and the contract prohibited the Center from programming racial data (A. 21), and because the racial data was available to the Attorney General from the Bureau of the Census and his regulations provided (or at least implied) that a State need not furnish information available to him from the Census Bureau [28 C.F.R. 51.10(b) (6) (i)].

"3. Maps showing the precise district boundaries for any State Senate or State House district in the 1968 redistricting plan which divides any county or city.

"4. A statewide map showing the State Senate and State House Districts in the 1964 redistricting plan, and maps showing the precise district boundaries for any such districts which divided any county or city.

"5. A history (for the last two elections) of every primary or general election contest for State Senate, State House, and for United States Congress in which there were one or more black candidates running. This history should include for each such contest the district involved, the names of the candidates (designated by race), and the number of votes received by each candidate.

"6. The name, home address, and race of each present State Senator, State (House) representative, and U. S. Congressman from Georgia.

"7. A legislative history of each submitted redistricting plan (the names of the sponsoring legislators for each of the three final bills, copies of all proposed alternative plans, the date and names of sponsoring legislators for each proposed alternative plan, and the names of legialators who voted in opposition to each of the final bills and to each of the proposed alternatives).

"As you know, the Attorney General has a 60-day period to consider enactments submitted pursuant to Section 5. As is provided in Section 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, the 60-day period

will not commence until the above-requested information, completing your submission, is received by the Department."

At the time of writing that November 19 letter, Mr. Norman already knew that the House reapportionment plan contained multi-member districts (R. 21-51).

The "additional information" requested by Mr. Norman's letter of November 19, 1971, included, as number one of seven items, the 1970 census population, by race, for the 1964 [sic, 1965], 1968, and submitted (1971) State House Districts (as well as for the 1964, 1968, and 1971 Senate Districts, and the 1964 and 1971 Congressional Districts). In order to furnish the additional information called for by this item, it became necessary to program the computer containing the 1970 census population with the racial breakdown of that population and with the 1965 and 1968 House districts (as well as the 1964 and 1968 Senate districts), which districts had not previously been described by the geographic units used by the Bureau of the Census.[8]

On January 6, 1972, the "additional information" requested by Mr. Norman was furnished to him by the State (A. 33).

On Friday, March 3, 1972 (within 60 days of January 6, but approximately 120 days after the November 5 sub-

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[8] The finding by the court below that the State "withheld" (A. 74) the additional information sought by the Attorney General is unsupported by any evidence in the record and is contrary to the facts. The United States did not even contend before the lower court that the information was "withheld" (see A. 32-33, Para. 9-11). Although not a part of the record, the fact is that the University of Georgia Computer Center devoted a total of 979 hours to this effort between November 19, 1971, and January 6, 1972, at an actual direct cost of $7,118.51. The Center opened and worked over the Thanksgiving holidays, and the Christmas holidays as well, times when it ordinarily would have been closed.

mission, appellants contend), the U. S. Attorney General objected to the combination of multi-member districts, numbered posts and majority (runoff) requirement, saying (A. 10-11):

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This objection was received by the General Assembly on Monday, March 6, at which time the legislature had only four days remaining in its 1972 regular (40 day) session (Ga. Const. Art. III, Sec. IV, Par. III, as amended in 1962; Ga. Code Ann. §2-1603). In those four days, the House of Representatives divided such multi-member districts into single member districts as it was able to (dividing 18 multi-member districts and leaving 32). It also adopted a resolution, addressed to the Attorney General, pointing out that it had not "changed" in its use of multi-member districts, designated posts, and majority (runoff) requirement (A. 17). The amended House reapportionment act (1972) also was submitted to the Attorney General, and was objected to by him on March 24, 1972, on the ground that it continued to use multi-member districts, numbered posts and the majority (runoff) requirement (A. 13).

The foregoing events all transpired following this Court's decision in *Whitcomb v. Chavis*, 403 U. S. 124, *supra*, on June 7, 1971, reversing the District Court's ban on the use of multi-member legislative districts.

In order to complete this statement of the case, it becomes necessary to go back in time. The State of Georgia commenced using multi-member districts in its House of Representatives as early as 1880 (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51). Following the census of 1960, there was a reapportionment of the Georgia House of Representatives, by which 8 counties were entitled to three Representatives, 30 counties were entitled to two Representatives, and the other 121 counties were entitled to one Representative (Ga. Laws 1961, p. 111). Thus, in 1961, Georgia had 38 multi-member districts in its House of Representatives.

Georgia began designating posts (seats) in multi-member districts in Fulton County in 1925 (Ga. Laws 1925, p. 205), and as more and more such local laws were enacted, a statewide designated post law was adopted in 1953 (Ga. Laws 1953, Nov. Sess., p. 269; Ga. Code Ann. §47-119). Candidates for these multi-member districts were required to designate the specific seat they were seeking, by naming the incumbent they desired to oppose. Because the largest multi-member districts consisted of three Representatives, the names of the incumbents, rather than numbers, were used to designate the posts, from 1953 to 1965.

Georgia's majority (runoff) election requirement (as opposed to the plurality vote requirement) commenced as to some offices as early as 1917 (Ga. Laws 1917, pp. 183-184). It was made applicable to legislators in pri-

maries in 1962 (Ga. Laws 1962, p. 1217 at p. 1218), and, at a special session of the General Assembly held in the summer of 1964, the majority vote requirement was made applicable to legislators in elections as well as primaries (Ga. Laws 1964, Ex. Sess., p. 26 at pp. 174-175, approved June 24, 1964).[4]

In the summer of 1964, prior to the 1964 presidential election, then Governor Carl Sanders called the General Assembly into special session (May 4—June 25) for the purpose of revising Georgia's Constitution and election laws (Ga. Laws 1964, Ex. Sess., pp. 1-3). The Georgia Election Code of 1964 was approved June 24, 1964 (Ga. Laws 1964, Ex. Sess., pp. 26-220; Ga. Code Ann. Title 34). The designated post (name-the-incumbent) requirement for House members was made applicable to all offices by Ga. Code §34-1002 (Ga. Laws 1964, Ex. Sess., at p. 89; now Ga. Code §34-1015), and the majority vote requirement, as heretofore noted, was made applicable to legislators in elections by Ga. Code §34-1514 (Ga. Laws 1964, Ex. Sess., at pp. 174-175) (now Ga. Code §34-1513).

Under the 1961 reapportionment and the 1964 Election Code, the Georgia General Assembly had 38 multi-member House districts, designated posts and majority (runoff) requirement. That was the law in Georgia as of the summer of 1964, and that was the way Georgia's House members were elected in the fall of 1964.

Thus, prior to November 1, 1964, the effective date of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c), Georgia was using multi-member districts, des-

[4] See *Bond v. Fortson*, 334 F.Supp. 1192 (N.D. Ga. 1971), *aff'd.* 404 U.S. 930 (1971).

ignated posts and the majority (runoff) election requirement as to its House of Representatives. The Attorney General objected in 1972, appellants submit, to Georgia's use of an election system which has not changed since June 24, 1964.[5]

Following *Reynolds v. Sims*, 377 U.S. 533 (1964), the District Court had ordered, on June 30, 1964 (amended November 3, 1964), that members of the Georgia House to be elected at the 1964 General Election hold office for only one year and that the House be reapportioned at the 1965 Regular Session. *Toombs v. Fortson*, 241 F.Supp. 65, 67 (N.D. Ga. 1965).

At the 1965 Regular Session, the Georgia General Assembly responded to the District Court's reapportionment order (Ga. Laws 1965, p. 127), creating 44 multi-member House districts, increasing the representation of many counties (e.g. Fulton County's representation went from 3 to 24, including 3 at-large), and decreasing the representation of many others (e.g. the representation of Lanier, Atkinson, Clinch and Echols Counties went from 4 to 1).

Due to this extensive House reapportionment in 1965, designation of posts by naming the incumbent was no longer feasible and the 1965 reapportionment act changed the post designation requirement for House members from

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[5] Following the 1964 presidential election, the Voting Rights Act of 1965 was introduced in Congress on March 18, 1965, and was approved August 6, 1965. The effective date of Section 5 was made retroactive to November 1, 1964. The Georgia Election Code of 1964 was adopted before the 1964 presidential election and before the Voting Rights Act of 1965 was introduced in Congress.

names of incumbents to numbers (Ga. Laws 1965, p. 127 at pp. 172-173).[6]

As heretofore noted, following release of the 1970 census figures in September, 1971, Governor Carter called a special session of the Georgia General Assembly, which met from September 24 to October 8, to reapportion the House, Senate and Congressional Districts (Ga. Laws 1971, Ex. Sess. pp. 1-3). The House reapportionment act, approved October 14, 1971, and containing 49 multi-member districts, was submitted, appellants contend, to the Attorney General on November 5, 1971. It was disapproved on March 3, 1972. In the closing days of its 1972 session, the General Assembly divided as many multi-member districts as it could in four days, leaving 32 such districts. The 1972 House reapportionment act was disapproved by Mr. Norman's letter dated March 24, 1972.

This suit was instituted March 27, 1972, in the United States District Court for the Northern District of Georgia seeking to enjoin the State from implementing its

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[6] The 1965 reapportionment act was approved by the District Court as an interim plan for use until the 1968 elections. *Toombs v. Fortson*, 241 F.Supp. 65, 71, 73 (N.D. Ga. 1965). It was reapproved by that Court in *Toombs v. Fortson*, 275 F.Supp. 128 (1966), and by this Court in *Toombs v. Fortson*, 384 U.S. 210 (1966). At the 1967 session of the General Assembly, the House was reapportioned pursuant to the 1965 order, with 46 multi-member districts (Ga. Laws 1967, pp. 187-220). The use of numbers to designate posts was continued (Ga. Laws 1967, p. 187 at p. 219). In *Toombs v. Fortson*, 277 F.Supp. 821 (1967), the District Court approved "the proposed reapportionment in substantial degree" (277 F.Supp. at 823), but required certain changes (277 F.Supp. at 833-839). At its next (1968) session, the General Assembly complied with the Court's 1967 order (Ga. Laws 1968, pp. 209-247), repeated the numbered post provision (Ga. Laws 1968 at p. 246), and by Final Judgment dated May 13, 1968 (Stipulation Exhibit G, R. 326), obtained the District Court's express and final approval of the House reapportionment plan, containing 47 multi-member districts.

reapportionment acts of 1971 and 1972. Defendants raised four special defenses, which defenses appear as the questions presented in this appeal (A. 24-27).

Hearing on those four questions was held on the afternoon of April 14, 1972 (A. 47). The court reconvened on the afternoon of April 18, announced that the State's four defenses would be overruled, called for discussion as to the relief to be granted, and received the Interim Report of the Government (A. 58, 59).[1]

In its Interim Report, the Government withdrew its objection to 17 multi-member districts it previously had objected to, retaining its objection as to 15 such districts (A. 59, 67-68). This corrective maneuver came too late to be acted upon by the General Assembly, which had adjourned at the conclusion of its 40 day session. Moreover, the Government volunteered that the District Court should consider requiring that all multi-member districts be subdivided, even those 17 not then objected to (A. 60-61, 70).

The District Court expressed the view at the April 18 hearing that if the 17 districts not then objected to by the Justice Department were subdivided, the multi-member question would be moot, and that it would be risky to have a special session of the legislature, to commence April 24, and not subdivide those 17 districts (A. 64).

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[1] Appellants do not consider that the United States of America, except as a legal entity, instituted this action. We do not consider that the United States Attorney General, occupied with many matters, disapproved Georgia's reapportionment plans. (He did not sign the letters of disapproval.) Thus, plaintiff-appellee will be referred to herein occasionally as the Government, and the Attorney General as the Justice Department, in accord with the facts of the case.

The order of the District Court was issued on April 19, 1972. The Court did not rule on the Government's suggestion that all multi-member districts be subdivided (A. 75, fn. 4). It did, however, enjoin the State from conducting elections under the 1971 and '72 House of Representatives reapportionment acts. Uncertain as to whether it must subdivide 15 or 32 districts, the General Assembly nevertheless prepared to convene in extraordinary session on April 24, 1972 (A. 75).

This Court granted a stay of that injunction on April 21, 1972 (No. A-1106), and the Government's motion to vacate the stay was denied on May 5, 1972.

(In a companion case, *Millican v. Fortson*, the District Court ordered reapportionment of the Georgia Senate, which order was stayed by this Court, No. A-1105, also on April 21, 1972. The Jurisdictional Statement in the appeal of that case, *Fortson v. Millican*, No. 72-76, is pending.)

SUMMARY OF ARGUMENT

1. Section 5 of the Voting Rights Act of 1965 has not been held by this Court to be applicable to reapportionment. This question was expressly excluded from the decision in *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). *Perkins v. Matthews*, 400 U.S. 379, 390-391 (1971), followed *Allen* but did not extend it to include reapportionment.

If Section 5 were applicable to reapportionment, it would be unconstitutional *as applied*. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), did not hold Section 5 to be valid *as applied* to reapportionment.

The 15th Amendment does not empower Congress to require certain States to submit their reapportionment (and redistricting) acts to the Justice Department for approval, for the reason that the formula for determining which States must submit (literacy tests and poor voter turnout in the 1964 presidential election) is wholly unrelated to reapportionment. Therefore, a requirement of submission of reapportionment acts by the covered States is not "appropriate legislation" within the authorization given Congress in the 15th Amendment.

2. In the case at bar, the Justice Department disapproved Georgia's use of multi-member legislative districts, per se, contrary to *Whitcomb v. Chavis*, 403 U.S. 124 (1971), notwithstanding Georgia's use of multi-member districts since 1880.

Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." It requires submission only of *new* voting regulations, *Katzenbach, supra*, 383 U.S. at 334. It requires submission of any *change* in election laws, *Allen, supra*, 393 U.S. at 549.

The Justice Department has no power under Section 5 to disapprove an election system it does not like but which has not changed. *Whitcomb v. Chavis, supra*, prohibits District Courts from eliminating multi-member districts *in toto* within a state, without justified findings of fact as to each such district. The Justice Department should not be permitted to circumvent *Whitcomb*.

3. The Attorney General did not find Georgia's use of multi-member districts to be discriminatory. He found that he was ". . . unable to conclude that the plan does

not have a discriminatory racial effect on voting." (A. 11).

The Attorney General has adopted regulations putting the same burden of proof on the submitting State as it would have in court (28 C.F.R. 51.19), notwithstanding the provision of Section 5 that the Attorney General's approval may be obtained "without such proceeding".

"The Attorney General does not act as a court in approving or disapproving the state legislation." *Allen, supra,* 393 U.S. at 549.

By applying a burden of proof, the Attorney General has assumed performance of a judicial function (28 C.F.R. 51.19) without any notice of charges to the submitting State and without any right to call witnesses or to cross-examine objectors.

The adoption of a burden of proof provides the Attorney General with the option of not deciding whether a change has the purpose or effect of denying or abridging the right to vote, with the result that State laws are suspended (vetoed) without decision (i.e., by indecision). Section 5 clearly shows that if the Attorney General is unable to decide within sixty days, the change should go into effect, subject to the rights of private litigants to pursue their rights in court (". . . neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure").

4. Congress put a 60 day time limit on the Attorney General in Section 5. Nevertheless, the Attorney General has promulgated regulations (28 C.F.R. 51.10, 51.18) which purport to give him an extension of time.

There is no authority for those regulations. Moreover, such regulations contravene the 60 day time limit set by Congress. The federal government owes the submitting States obedience to the time limit fixed by Congress, in order to carry out the congressional intent to provide covered States with a rapid method of rendering new laws enforceable. *Allen, supra*, 393 U.S. at 549.

ARGUMENT

1. If Section 5 of the Voting Rights Act Is Applicable to Reapportionment, It Is Unconstitutional As Applied.

The primary question in this appeal is whether Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c) is applicable to reapportionment acts, and if so, whether Section 5 is constitutional as applied.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court expressly declined to decide whether Section 5 is applicable to reapportionment, saying (393 U.S. at 569):

> "Also, the question of whether §5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principle involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that §5 have a narrow scope; we leave to another case a consideration of any possible conflict."[8]

[8] This administrative problems have arisen (J.S. 13-14).

The question properly left unanswered in *Allen* is the primary question in the case at bar.

Allen, supra, arose from Virginia. It was decided jointly with three cases from Mississippi, *Fairley v. Patterson, Bunton v. Patterson,* and *Whitley v. Williams,* 393 U.S. 544 (1969). The Virginia case, *Allen,* involved a change in procedures for casting write-in votes. *Fairley* involved a change from district to at-large election of county supervisors. *Bunton* involved a change from election to appointment of county superintendents of education. *Whitley* involved changes in procedures for independent candidates gaining positions on the general election ballot.

The Mississippi appellees contended in *Fairley* that Section 5 was not intended to apply to a change from district to at-large elections, because such an application, they feared, would cause a conflict in the administration of reapportionment legislation (393 U.S. at 564).

The United States, in its *amicus* brief in the Mississippi cases, replied that ". . . none of the instant cases involve the typical sort of apportionment or districting questions presented in the cases to which respondents make reference." (Memorandum of the United States as Amicus Curiae, filed in *Fairley, supra,* at p. 23, hereinafter referred to as the Government's *Fairley* Brief). Then, referring specifically to *Fairley* (change from district to at-large elections), the Government said (*ibid* at pp. 23-24):

> "Nonetheless, the case does not fit into the ordinary pattern of apportionment and districting litigation, and thus a holding that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure

> relates to all changes in the affected States relating to apportionment and districting of governmental bodies."

We read the Government's brief to say: "Your Honors, your holding that Section 5 is applicable in *Fairley* will not be tantamount to concluding that Section 5 is applicable to reapportionment and redistricting."

Yet, in the court below the Government argued, successfully, that *Fairley* (and *Perkins v. Matthews*, 400 U.S. 379, to be discussed below) "clearly resolves" the question of the applicability of Section 5 to reapportionment (R. 170, Plaintiff's Brief, p. 7). (Compare the approach of the Solicitor General at page 5 of his Memorandum for the United States, filed in the instant case, where he states that the language of this Court's opinions in *Allen* and *Perkins* "strongly supports" the conclusion of the court below.)

In *Fairley*, the Government stated (Government's *Fairley* Brief, *supra*, at p. 22):

> "In any event, there is no need here for the Court to reach the question whether Section 5 extends to the typical sort of apportionment litigation and districting changes which have followed in the wake of this Court's decisions in *Baker v. Carr*, 369 U.S. 186 . . . ."

And this Court did not reach that question, *Allen*, 393 U.S. at 569.

In view of its position in *Fairley*, the Government should not now be heard to say that this Court there found Section 5 to be applicable to reapportionment. In *Fairley*, the Government took the position that, as regards

Section 5 of the Voting Rights Act, a change from district to at-large election of county supervisors is not in the same category as reapportionment (Government's *Fairley* Brief, pp. 23-24). We here adopt that position of the Government.

Perkins v. Matthews, 400 U.S. 379 (1971), mentioned above, involved (a) changes in locations of polling places, (b) changes in municipal boundaries through annexations, and (c) a change from ward to at-large election of aldermen. Finding these changes subject to Section 5, a majority of this Court followed *Fairley* and the interpretation given Section 5 by officials of the Justice Department, as shown by the Government's *Fairley* Brief, and by their testimony before a Senate Subcommittee, *Perkins*, 400 U.S. at 390-392.

Perkins followed *Allen (Fairley)*, as Mr. Justice Blackmun, joined by The Chief Justice, observed. *Perkins*, 400 U.S. at 397. However, relying on the interpretation of officials of the Justice Department, it can still be said:

> "Nonetheless, the case [*Perkins*] does not fit into the ordinary pattern of apportionment and districting litigation, and thus a [the] holding that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure relates to all changes in the affected States relating to apportionment and districting of governmental bodies." (Government's *Fairley* Brief, pp. 23-24, matter in brackets added.)

Thus, we are at this point: This Court has not decided whether Section 5 is applicable to reapportionment and redistricting. It did not decide that question in *Allen* and it did not do so in *Perkins*. The question remains, is reapportionment subject to Section 5?

The legislative history has been set forth extensively in *Allen* and *Perkins*, and no useful purpose would be served by retraversing ground covered there (*Perkins*, 400 U.S. at 398, opinion by Mr. Justice Harlan). (It should be clear, nevertheless, that members of the House of Representatives, by their silence on a subject vital to themselves, showed that they did not consider congressional redistricting to be subject to approval by the Attorney General.)

There is new evidence, however, of the interpretation of the statute by the officers charged with its administration.

Mr. David L. Norman, speaking on behalf of the Attorney General, on behalf of the administration and on behalf of the Civil Rights Division of the Justice Department, stated that he participated in the drafting of the Voting Rights Act of 1965 [Hearings before the Civil Rights Oversight Committee (Subcommittee No. 4) of the Committee on the Judiciary, House of Representatives, on the Enforcement of the Voting Rights Act (May 26, 1971), at pp. 5-6]. Upon informing the Subcommittee that on May 25, 1971, the Attorney General announced proposed guidelines to implement Section 5 (*ibid.* at pp. 5-6), Mr. Norman was asked why no guidelines had been needed prior to May, 1971 (*ibid.* at 68). He testified (*ibid.* at 68):

> "I think it is a combination of the two Supreme Court decisions which really opened up a wide range of things that had to be submitted.
>
> "We didn't formerly think that reapportionment as such had to be submitted, or annexation. I think the

> submitting authorities thought a lot of things didn't have to be submitted."

Here is Mr. Norman, a drafter of the 1965 Act, the man in charge of the Civil Rights Division, testifying on behalf of the Attorney General that "We didn't formerly think that reapportionment as such had to be submitted. . . ." *(Ibid.)*

Reapportionment simply is not a "voting qualification or prerequisite to voting, or standard, practice, or procedure *with respect to voting*" within the meaning of Section 5.

If Section 5 is to be applied to reapportionment, the question remains, is it constitutional as applied? The "as applied" question was not decided in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

This Court considered the facial constitutionality of certain sections of the 1965 Voting Rights Act in *Katzenbach, supra*. It did not rule on the validity of the entire Act (383 U.S. at 307, 316, 337). It did not rule on the *application* of Section 5 to reapportionment. In that case, Section 5 was held valid against two attacks—that it violated Article III by directing the District Court in Washington to issue advisory opinions (383 U.S. at 323, 335), and violated the due process clause by limiting litigation to a distant forum (383 U.S. at 323, 331). The due process argument was defeated because a State is not a "person" (383 U.S. at 323-324). In the case at bar individual defendants assert their personal rights as well as their rights as office holders (A. 27-28), and the constitutional challenges are based upon different grounds. Thus, the case at bar raises questions which were not decided in *Katzenbach*.

However, the decision in *Katzenbach* is instructive. The Voting Rights Act suspended registration tests in those states and political subdivisions which came within its coverage formula (Section 4), to wit: (1) those which used tests or devices (e.g. literacy tests) for voter registration, and (2) which had poor voter turnout in the 1964 presidential election (383 U.S. at 330). The Court stated the question before it to be (383 U.S. at 324): "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" The fundamental ground of South Carolina's challenge was that the Act exceeded the powers of Congress and encroached on an area reserved to the states (383 U.S. at 323). The Court said that (383 U.S. at 324): "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." The Court then found that the States affected by the coverage formula were those which Congress had legitimately determined used tests and devices discriminatorily. The coverage formula was held to be rational (383 U.S. at 330, 331). Section 5 (review of new voting laws) was upheld because some of the covered States had resorted to the extraordinary strategem of contriving new rules to circumvent adverse federal court decrees, and the Court held, under "these unique circumstances", that "exceptional conditions" can justify legislative measures "not otherwise appropriate" (383 U.S. at 334-335).

Let us now examine the Voting Rights Act as and if applied to reapportionment. First, the coverage formula is completely unrelated to the problem. The basis of reapportionment is population, not registered voters, and the voter participation in the 1964 presidential election

is completely foreign to the apportionment of a State legislative body. Moreover, reapportionment is a national problem; it is not unique to Georgia, Alabama, Louisiana, Mississippi, South Carolina, Virginia, and some counties in North Carolina. New York, Florida, Texas and Indiana, to mention only a few, have had serious reapportionment disputes. Finally, as for Section 5 itself, there is no evidence of any resort to contriving new apportionment plans to circumvent federal court decrees. There is only evidence of adopting new plans to meet the smaller and smaller deviations permitted by federal courts.

Thus, the reasons for which Section 5 was held valid in *Katzenbach* simply are inapplicable if that section is applied to reapportionment. The unique circumstances, of geography and circumvention, are not present in the reapportionment field so as to justify this inappropriate legislative measure.

Let us assume for the moment that Congress enacted a law, entitled the Reapportionment Approval Act of 1965, requiring certain States, which had literacy tests and in which voter participation in a presidential election was low, to submit their reapportionment acts to either the District Court in Washington or to the Justice Department for approval. Would that be appropriate legislation as authorized by the 15th Amendment? We submit that such an Act clearly would not be "appropriate" under the 15th Amendment. Yet the court below has held that the Voting Rights Act has that effect and nevertheless is valid.

We respectfully submit that Section 5 is not "appropriate legislation" within the meaning of Section 2 of the 15th Amendment if Section 5 is applied to reapportionment, and that if so applied that section unduly impinges

upon the rights, privileges and immunities of the people and the States (Art. IV, Sec. 2; Amendments 9 and 10).

Moreover, Section 5 denies the full faith and credit to which Georgia's laws are entitled under the Constitution (Art. IV, Sec. 1), and, when applied to reapportionment, leaves Georgia without a House of Representatives; i.e. without a republican form of government, contrary to the guaranty clause (Art. IV, Sec. 4). See *Bauers v. Heisel*, 361 F.2d 581 (C.A. 3, 1966).

We most respectfully submit that this Court should declare Section 5 of the Voting Rights Act unconstitutional as applied to reapportionment.

2. The Attorney General Has No Power Under Section 5 to Disapprove an Election System Which Has Not Changed.

If Section 5 is applicable to reapportionment and if it is constitutional as applied, then the interpretation and construction of Section 5 become critical to the thirteen covered and affected States.

The first of these questions involves the scope of review by the Justice Department under Section 5.

It is clear that Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." Section 5 suspends only "new" voting regulations. *South Carolina v. Katzenbach, supra*, 383 U.S. at 334. It requires submission of any "change" in election laws. *Allen v. Board of Elections, supra*, 393 U.S. at 549.

It is equally clear that Georgia was using multi-member districts continuously from 1880 to date (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51),

and was using designated posts and majority election prior to November 1, 1964.

It is also clear beyond doubt that the Justice Department objected, nevertheless, to Georgia's use of multi-member districts. Mr. Harry Piper, speaking for the Government, stated to the court below (A. 55-56):

> "The United States does not contest that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan."

It is our position that the Justice Department was without power to object to Georgia's use of multi-member districts, which Georgia has been using since 1880, because there has been no "change".

We have said that Section 5 clearly suspends, and requires submission of, "new" voting laws; i.e., "changes" in voting laws. We contend that Section 5 is equally clear that it authorizes the Justice Department to disapprove only the "change", because, as was stated in *South Carolina v. Katzenbach, supra,* 383 U.S. at 335, the purpose of Section 5 was to prevent the contrivance of "new" rules to evade the suspension of literacy tests. However, the Justice Department interprets Section 5 differently. They contend that the "change" only "triggers" the requirement of submission and ". . . does not necessarily limit the standards of review or the permissible range of ob-

jection resulting from such review." (R. 170, Plaintiff's Brief to the District Court, pp. 12-13.)

We submit that Section 5 was extended in *Allen* and *Perkins, supra,* to cover certain "election" law changes in addition to "voting" law changes. Now, if Section 5 does not limit the Justice Department's "standards of review" or its "range of objection", then Section 5 is being extended even further.

Permit us momentarily to assume a hypothetical situation for the purpose of illustrating the awesome scope of the power claimed by the Justice Department. The Georgia House of Representatives had 205 members in 1961. It had 205 members in the reapportionment of 1965. Assume that the 1972 reapportionment plan called for 205 members, but that the district lines were changed considerably as compared to 1961 and 1965. Under the Justice Department's interpretation of Section 5, the Attorney General might decide that a House composed of 225 members would increase minority representation and he could object to the continued use of 205 members because the change in district lines "triggered" the requirement of submission, but the Attorney General was not limited to objecting to that which had "changed". *Cf. Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187 (1972).

The Justice Department's contentions make it imperative that Georgia raise the question: Does Section 5 empower the Attorney General to disapprove a law which has not "changed" within the meaning of that Section?

In the case at bar, the Justice Department notified the Georgia General Assembly in the closing days of its session that the use of multi-member districts, in combina-

tion with the designation of posts and majority elections, was disapproved. The Justice Department did not say to the General Assembly that multi-member districts numbered 62, 65, 74, 76, 77, 85, 86, 87, 89, 102, 114, 115, 122, 124 and 128 were disapproved as being new multi-member districts, or as being multi-member districts with changed boundaries, or as having had the number of members changed. By disapproving the use of multi-member districts as such, the Justice Department told the Georgia General Assembly to subdivide, into single member districts, all multi-member districts. After the General Assembly adjourned, the Government conceded in court that 17 of the multi-member districts to which it had objected either contained no cognizable racial minorities at all or had such dispersed minorities that the subdividing of those districts would not increase their voting strength (A. 59, 67-68). This corrective maneuver came too late to be acted upon by the adjourned General Assembly. By withdrawing in court its objection to 17 specified multi-member districts, the Government sought to object to the other 15 then identified districts (A. 69), thereby converting its original general objection to all multi-member districts into an objection to 15 specified districts.

We submit that the Government cannot use the District Court to correct its overtaking. In its letters of objection (A. 9 and 13), the Government objected to the use of multi-member districts, as such, not to 15 later identified districts. The Government's objection was either valid when made, or invalid, and its attempt in court to confine its objection cannot cure its original invalidity.

The Justice Department objected to the use of multi-member districts, in principle, notwithstanding this

Court's decision in June, 1971, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), rendered shortly before Georgia's special reapportionment session. They objected to the system, not to its application in particular changed circumstances. Although the application of many multi-member districts had changed, the use of multi-member districts as an election system has not changed (since 1880).

Glynn County, Georgia, offers a perfect example of our complaint. Glynn County was a 2 man multi-member district in 1961 (Ga. Laws 1961, p. 111), a 2 man multi-member district in the reapportionment of 1965 (Ga. Laws 1965, p. 133), a 2 man multi-member district in the reapportionment of 1967 (Ga. Laws 1967, p. 192), a 2 man multi-member district in the reapportionment of 1968 (Ga. Laws 1968, p. 214), a 2 man multi-member district in the reapportionment of 1971, and a 2 man multi-member district in the reapportionment of 1972. Not since 1941 has there been any change whatsoever in the 2 man multi-member representation of Glynn County in the Georgia House of Representatives (see Ga. Laws 1951, pp. 26-27, Ga. Laws 1941, pp. 348-349), yet that district was disapproved by the Justice Department in its attack on multi-member districts. Even in court, the Justice Department maintained its objection to District 128 —Glynn County (A. 69, 63-64).

It has been said that Congress intended that Section 5 have a broad scope (*Allen, supra*, 393 U.S. at 568). It has not been said that Congress intended that the Attorney General have even broader powers under that broad Section. No court to our knowledge has said, as the Government here has said, that a change in a law "... only triggers the requirement for submission under

Section 5 and does not necessarily limit the standards of review or the permissible range of objection resulting from such review." (R. 170, Plaintiff's Brief in the District Court, pp. 12-13.) The Government's interpretation of Section 5 would render it overbroad.

In *Whitcomb v. Chavis, supra,* this Court said (403 U.S. at 160-161):

> "We are likewise at a loss to understand how on the court's own findings of fact and conclusions of law it was justified in eliminating every multi-member district in the State of Indiana."

We likewise are at a loss to understand how, without findings of fact (see section 3 of this brief, below), the Justice Department was justified in eliminating every multi-member district in the State of Georgia.

The Attorney General's objection to the use of multi-member districts, as such, is invalid, we submit, because Georgia was using multi-member districts, as such, in 1961, and continued to do so, with District Court approval, throughout the 1960's and in its 1971 and '72 reapportionment plans. The Justice Department exceeded its authority in objecting to laws as to which there had been no change.

3. The Attorney General Is Without Power to Disapprove a State Law Which He Does Not Find to Be Discriminatory, But About Which He Is Unable to Reach a Decision.

If Section 5 of the Voting Rights Act is applicable to reapportionment, and is constitutional as applied, and if it empowers the Attorney General to disapprove an election system which has not changed, then the question

arises: Does it empower the Attorney General to disapprove a law which he does not find to be discriminatory but about which he is unable to reach a decision?

In his March 3, 1972, letter disapproving Georgia's 1971 reapportionment plan, Assistant Attorney General David L. Norman wrote as follows (A. 10-11):

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."[9]

This indecisive policy of denial is wrong, we respectfully submit. It is based upon Section 51.19 of the Attorney General's regulations. (Those regulations have no statutory basis, as will be shown in the following section of this brief.)

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[9] In his March 24, 1972, letter disapproving Georgia's 1972 plan, Mr. Norman wrote (A. 13):

> "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972, letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972, letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives."

In view of Mr. Norman's reference to what a court would do, permit us to clear up one point immediately. Neither the Attorney General nor the Justice Department is a court. Const. Art. III, Secs. 1 and 2.

"The Attorney General does not act as a court in approving or disapproving the state legislation." *Allen, supra,* 393 U.S. at 549.

Notwithstanding *Allen,* the Attorney General is purporting to act as a court. His regulation §51.19 states that Section 5 of the Voting Rights Act ". . . imposes on the Attorney General what is essentially a *judicial function.*" (Italics added.) His regulation §51.19 continues:

> "Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia."

The Attorney General has put the same burden of proof for declaratory judgment on a submitting State as it would have in court, notwithstanding the fact that Section 5 says that the Attorney General's approval can be obtained "without such proceeding". The regulations continue (§51.19):

> "The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice."

The material on which the decision is based consists of three types: (a) material from the submitting authority, (b) material from individuals or groups, and (c) results

of investigations conducted by the Justice Department. By rule 51.26(a), material from individuals or groups may be withheld from the submitting State, and investigative reports shall be withheld from the State. Thus, the decision is based in part on material not available to the State. Therefore, the burden of proof is on the State notwithstanding the absence of any notice of the charges and of any right to cross-examine objectors.

The regulations continue (§51.19):

> "If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

Thus, there are three possible results: (1) The Attorney General will approve the *change* if he finds that it does not have a racially discriminatory purpose or effect, or (2) he will disapprove the *change* if he finds that it has a racially discriminatory purpose or effect, or (3) according to him, he may find that he cannot decide within 60 days, in which event he will disapprove the *change*.

The Norman letter does not follow options (1) or (2), and hence it presumably follows option (3), set forth in

the last sentence of §51.19, quoted above, which option is erroneous. Mr. Norman said (A. 11): ". . . I am unable to conclude that the plan does not have a discriminatory racial effect on voting."[10]

By adopting the burden of proof standard, the Attorney General has constituted his staff as a court, without providing the submitting State with notice of the charges, without the right to call witnesses, without the right to cross-examine objectors, and without any of the procedural rights necessary to a judicial proceeding.

In adopting Section 5 of the Voting Rights Act, Congress did not intend that the Attorney General should act as a court, applying the same burden of proof as a court, without providing procedural safeguards for the parties, as evidenced by the fact that Section 5 specifically provides that the Attorney General's approval can be obtained "without such proceeding". Congress did not, in Section 5 or elsewhere, establish the Attorney General as a court. Const. Art. III, Secs. 1 and 2.

Section 5 does not permit the Attorney General the option of not deciding. He may "interpose an objection" if he finds the change to have the purpose or effect of denying or abridging the right to vote. But he is not authorized to object unless he finds the change to be discriminatory. If he does not find the change to deny or abridge the right to vote, he should leave the matter to be resolved in private litigation as provided by Section 5 (". . . neither the Attorney General's failure to object

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[10] We are aware of the hope that §51.19 would resolve problems of indecision. *State Board of Election Commissioners v. Evers*, 405 U.S. 1001 (1972). However, indecision is itself a problem and §51.19 cannot resolve the underlying problem.

nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure").

Let us examine what happened in this instance. Mr. Norman based his decision on four District Court decisions, saying that he was persuaded that a court would invalidate the combination of multi-member districts, numbered posts, and the majority (runoff) requirement (A. 10). He relied first on a footnote in *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). In that case private plaintiffs attacked North Carolina's anti-single shot law and its numbered seat law. Thirty-nine of North Carolina's 100 counties are covered by the Voting Rights Act of 1965. The anti-single shot law was enacted in 1955 but was made applicable in only 19 counties. The numbered seat law was enacted in 1967, was made applicable only to certain seats, and had been disapproved by the U. S. Attorney General as to those counties in which it applied which were under the Voting Rights Act. Thus, the numbered seat law applied to some seats and in some counties. The District Court held the anti-single shot law to be unconstitutional on equal protection grounds, because it applied to some counties and not to others, and the State had shown no justification for this difference in treatment. The Court held the numbered seat law to be invalid for the same reason. The Court expressly refused to decide whether the two laws had been selectively applied to abridge the rights of Negro voters in violation of the 15th Amendment. The decision did not deal with multi-member districts as such.

The second case relied upon by Mr. Norman (A. 11) was *Graves v. Barnes*, 343 F.Supp. 704 (W. D. Tex.

1972), a three judge, four opinion decision. In the *per curiam* portion of the opinion, Part II, the constitutional validity of multi-member districts was questioned. However, only one judge (District Judge Justice) concurred in Part II of the *per curiam* opinion. Multi-member districts in two Texas counties (Dallas and Bexar) were invalidated whereas nine multi-member districts in other areas were not. See *Graves v. Barnes*, 405 U.S. 1201 (1972). The two districts were invalidated on the basis of *Whitcomb v. Chavis*, 403 U.S. 124 (1971). The Dallas County 18 man multi-member district with 1,300,000 people (the equivalent of 3 congressional districts) was found to be invalid due to a "jay-bird" committee, the Dallas Committee for Responsible Government (DCRG), which controlled primaries and elections without appealing to the Negro vote. The Bexar County (San Antonio, population 830,460) 11 man multi-member district was held invalid on the basis of discrimination against Mexican Americans. The District Court did not invalidate multi-member districts per se.

The Alabama decision cited by Mr. Norman (A. 11), *Sims et al. v. Amos*, 336 F.Supp. 924 (M.D. Ala. 1972), is a one man-one vote case. The Alabama legislature met twice but failed to reapportion on the basis of the 1970 Census. Plaintiffs proposed a plan using single-member districts. Defendants proposed three plans, all using multi-member districts. The best of the three had a 29.97% deviation in the House and 24.28% in the Senate. The Court rejected the defendants' plans, citing *Connor v. Johnson*, 402 U.S. 690, 692 (1971), for the proposition that in court fashioned apportionment plans single-member districts are preferable. The Court, following *Connor*,

adopted plaintiffs' single-member plan with a 2.23% deviation in the House and 1.39% in the Senate.

The last case cited by Mr. Norman (A. 11) was *Bussie v. Governor of Louisiana*, 333 F.Supp. 452 (E.D. La. 1971). There the Louisiana legislature adopted House and Senate plans, suit was filed, the plans were submitted to the U. S. Attorney General under Section 5, and he found them to be racially discriminatory and disapproved them. The Court then appointed a special master to formulate a plan. His plan, which the Court adopted, used single-member districts. Objection to the use of single-member districts was overruled by the Court. Although not cited, it is clear that use of single-member districts by the master was in accord with *Connor, supra*.

Thus, what do we have? Four court decisions, not one of which holds that the use of multi-member districts, designated posts and majority (runoff) requirement, singly or in combination, is racially discriminatory per se. Georgia's reapportionment of its House of Representatives was disapproved in Washington based on *obiter dictum*. The Government disapproved Georgia's use of multi-member districts, per se. And that disapproval was directly contrary to the holding of this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

In *Whitcomb*, the Court reversed the District Court which had held multi-member districts to be invalid. The Court reiterated its holdings that multi-member districts are not per se illegal, and said (403 U.S. at 144):

> "But we have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting

strength of racial or political elements. We have not yet sustained such an attack."

The Attorney General, by his regulations and the test used in this case (§51.19), has taken the burden of proof from those challenging multi-member districts and has put that burden on the State, contrary to *Whitcomb*. In this case, §51.19 could be classified as an extraordinary strategem which flies in the face of an adverse federal court decree. If the Justice Department were going to invalidate all multi-member districts in the face of *Whitcomb*, its lawyers could have said so before Georgia's special reapportionment session. The Attorney General's burden of proof test and indecisive denial policy is, we submit, invalid.

4. The Attorney General Is Without Power to Extend the 60 Day Time Limit Congress Set in Section 5.

By letter dated March 24, 1972 (A. 13), the Justice Department disapproved the House of Representatives reapportionment plan adopted on March 9, 1972, the last day of the 1972 regular session.

If Section 5 is applicable to reapportionment and valid as applied, if it empowers the Attorney General to disapprove an election system which has not changed, and if his burden of proof standard and indecisive denial policy are valid, then the March 9, 1972 reapportionment plan was timely disapproved and thus is suspended.

However, the reapportionment plan adopted at the 1971 special session was submitted, appellants contend, to the Justice Department on November 5, 1971 (A. 32). Its disapproval approximately 120 days later, by letter

dated March 3, 1972 (A. 9), was not within the 60 day time limit Congress placed on the Attorney General in Section 5, and hence the 1971 plan is in effect, appellants contend.

The Justice Department contends however that the 60 day time limit did not commence until January 6, 1972, by virtue of the Attorney General's regulations, Sections 51.18(a) and 51.10. If that be so, the March 3, 1972 objection was timely.

The Justice Department's argument assumes, however, the validity of the Attorney General's regulations, whereas none of the cited authorities authorizes the Attorney General to extend, by regulation or otherwise, the 60 day limit fixed by Congress for the suspension of State voting laws.

The Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (28 C.F.R. 51) cite as their "Authority" Section 5 of the Voting Rights Act, and 5 U.S.C. §301, and 28 U.S.C. §§509, 510.

Section 5 does not say anything about regulations. 5 U.S.C. §301 authorizes a department head to prescribe regulations for the government of his department and its employees, for the distribution and performance of its business, and for the custody and use of its records and property. It gives a department head only housekeeping authority. *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 875 (C.A. 5, 1961).

28 U.S.C. §509 provides simply that the Attorney General is vested with all the functions of his subordinates, except with respect to hearing examiners, prisons and paroles. Reliance on 28 U.S.C. §509 as authority for

the promulgation of rules for the administration of Section 5 is untanned bootstrap.

28 U.S.C. §510 provides that the Attorney General may delegate his functions to his subordinates.

There is no statutory authority for the Attorney General's rules.

In *Allen, supra,* the Mississippi appellees argued that service of their briefs upon the Attorney General constituted a submission under Section 5. Rejecting that argument, this Court said (393 U.S. at 571):

> "While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a 'submission'. A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act."

We fear that the Attorney General's rules were promulgated pursuant to the statement in *Allen* that the Attorney General has not required any formal procedure. If the Court had said in *Allen* that the Attorney General has not abused his power, he could now cite *Allen* for the proposition that he has authority to do so.

The Attorney General has attempted to define what constitutes a submission, §51.10, so as to give himself an extension of time under his regulations §51.3(b) and

§51.18(a). However, what constitutes a submission under Section 5 is a judicial question, as in *Allen, supra,* not an administrative question.

The undisputed facts show that the 1971 reapportionment act, plus maps thereof, the 1968 reapportionment act plus maps of those districts, the population variances for each district, and the other materials listed on Complaint Exhibit 6 (A. 19-23), were all submitted to the Attorney General on November 5, 1971, with a request for his consideration (A. 19). This constituted a submission within the meaning of Section 5, *Allen, supra,* 393 U.S. at 571. Under Section 5, he had 60 days from November 5, 1971, in which to act.

On November 19, 1971, he asked for seven categories of materials, none of which related to multi-member districts, designated posts or the majority election requirement. Instead, they related to the 1970 census, by race, for the 1971 and past (1965 and 1968) reapportionment plans, names and addresses of all members of the House, histories of elections in which black candidates had run, and votes on the reapportionment bill and proposed alternatives.

The Attorney General disapproved on March 3, 1972, the plan which had been submitted to him on November 5, 1971. His disapproval came not within the 60 days fixed by Congress but about 120 days after submission. His disapproval of the 1971 reapportionment plan was invalid because ". . . the Attorney General has not interposed an objection within sixty days . . ." (Section 5) after it was submitted to him. Congress put no time limit in Section 5 on the District Court for the District of Columbia. It did, however, put a time limit on the Justice

Department. The Attorney General nevertheless contends that his authority to extend the 60 day limit placed on him by Congress comes from his own regulations, §51.18(a). That section reads in pertinent part as follows:

> "(a) If the submission does not satisfy the requirements of §51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice."

The §51.10(a) referred to above provides that a submission shall consist of six things, the sixth of which is that the Attorney General *may* require the submission of "other information", including, *but not limited to*, the more numerous things in part (b) of §51.10.

Because the requirements of §51.10 are the Attorney General's own requirements and because his subsection 6 allows him to require "other information", section 51.18(a), quoted above, actually reads as follows:

> If the submission does not satisfy me, I shall request other information and advise the submitting authority that the 60-day period [fixed by Congress] will not commence until I receive such other information as I request.

Defendants contend that the Attorney General had no authority to adopt his regulations, particularly regulations giving himself an extension of time under Section 5. He could just as well adopt regulations under Rule 12 of the Federal Rules of Civil Procedure saying that, by defining what constitutes a pleading asserting a claim, he

could extend his 60 days for answering a lawsuit until he had received all the information he requested from the plaintiff.

In *United States v. Robinson*, ____F.2d____ (C.A. 5 No. 71-1058, Jan. 12, 1972), the Fifth Circuit held that under the wiretap act only the Attorney General or an assistant attorney general specially designated by him could authorize a wire tap application. Could the Attorney General adopt a regulation providing that if he did not hear what he was listening for, he could give himself an extension of time and keep the wire tap running longer? We believe that he could not. Moreover, we believe that the laws of States are entitled to as much respect as private telephone conversations. The federal government, created by the States, owes the States at least obedience to the time limits fixed by Congress.

Clearly Section 5 gives the Attorney General no authority to promulgate regulations extending the 60 days set by Congress. The purpose of the provision was to limit the time in which new laws, duly adopted by a covered State, were held in abeyance, and to expedite effectuation of those new laws. See *Allen, supra*, 393 U.S. at 549. If it had seen fit to do so, the Congress could have put no time limit on the Attorney General, providing (as was done for the District Court for the District of Columbia) that a new law would not become effective "unless and until" approved by the Attorney General. Congress did not do so. Instead, it put a time limit on the Attorney General.

The Government has argued that Congress certainly did not expect that changes as complex as reapportionment plans could be reviewed within 60 days and without

supplying the Attorney General with such other information as he might request. That argument shows that Congress did not intend for the Attorney General to be reviewing reapportionment plans in the first place. If Congress did so intend, then the Attorney General should ask Congress for additional time, and funds to employ researchers and statisticians to compile the information he wants. Section 5 is onerous enough without burdening the States with additional duties under it.

The claimed power to extend the 60 day limit fixed by Congress is unauthorized. Thus, Georgia's reapportionment act adopted October 14, 1971, and submitted November 5, 1971, is in effect.

CONCLUSION

Georgia has tried to live under Section 5 of the Voting Rights Act. In itself, that section is galling. In its administration, it is oppressive.

When the Justice Department expanded Section 5 and disapproved a "change" that wasn't a change, Georgia realized that she could no longer submit without trying to lighten the burden of Section 5.

We ask this Court to declare Section 5 to be unconstitutional, at least as and if applied to reapportionment. We ask this Court to declare invalid the Justice Department's disapproval of the Georgia House of Representatives reapportionment plans on the ground that the Attorney General is without power to disapprove Georgia's use of multi-member districts because there has been no change. We ask this Court to declare that the Attorney General has no authority to promulgate regulations imposing an invalid burden of proof test and extending the 60 day time limit fixed by Congress.

We ask this Court to reverse the decision of the District Court.

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions Directly Involved

AMENDMENT 15

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Other Constitutional Provisions Involved

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—

between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. * * * *

* * *

ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

* * *

AMENDMENT 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions Directly Involved

Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. §1973c):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) of this title based upon determinations made under the first sentence of section 4(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) of this title based upon determinations made under the second sentence of section 4(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or proce-

dure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Other Statutory Provisions Involved

Section 4 of the Voting Rights Act of 1965, as amended; pertinent provisions of (42 U.S.C. §1973b):

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten

years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and

with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this Section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) Definition of test or device.

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter. (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) ....

5 U.S.C. §301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

28 U.S.C. §509. Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

28 U.S.C. §510. Delegation of authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

Regulations Involved

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, pertinent provisions (28 C.F.R. 51):

AUTHORITY: The provision of this Part 51 issued under Sec. 5, 84 Stat. 315; 5 U.S.C. 301, 28 U.S.C. 509, 510, 42 U.S.C. 1973c.

§51.3 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of §51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in §51.18.

(c) . . . .

§51.10 Contents of submissions.

(a) Each submission shall include:

(1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.

(2) The date of final adoption of the change affecting voting.

(3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legis-

lature, ordinance of city council, redistricting by election officials).

(4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in §51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

(1) A statement of the reasons for the change affecting voting.

(2) A statement of the anticipated effect of the change affecting voting.

(3) A statement identifying any past or pending litigation concerning the change affecting voting or related prior voting practices.

(4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted the submitting authority may refer to the date of prior submission and identify the previously submitted changes.

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained in the publication of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates, by race, who have run for such office in the last two elections and the results of such elections.

(7) Evidence of public notice or opportunity for the public to be heard. In examining submissions, consideration may be given, where appropriate, to evidence of public notice and opportunity for interested parties to participate in the decision to adopt or implement the pro-

posed change and to indications that such participation in fact took place, or to evidence of notice to the public that a submission has been made soliciting comment by the public to the Department of Justice. Examples of materials demonstrating public notice or participation include:

(i) Copies of newspaper articles discussing the proposed change.

(ii) Copies of public notices (and statements regarding where they appeared, e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups) which describe the proposed change and invite public comment or participation in hearings, or which announce submission to the Attorney General and invite comments for his consideration.

(iii) Minutes or accounts of public hearings concerning the proposed changes.

(iv) Statements, speeches, and other public communications concerning the proposed changes.

(v) Copies of comments from the general public.

(vi) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(8) Where information requested herein is relevant but not known and not believed to be available, submissions should so state.

(9) Where information furnished reflects an estimation, submissions should identify the individual and state his qualifications to make the estimate.

(10) Submissions should identify in general the source of any information they supply.

(11) When a submitting authority desires the Attorney General to consider any information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by stating the date and subject matter of the earlier submission and identifying the relevant information therein.

§51.18 Obtaining information regarding submissions.

(a) If the submission does not satisfy the requirements of §51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission.

(b) ....

§51.19 Standard for decision concerning submissions.

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted

by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

§51.26 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence, notations concerning conferences with the submitting authority or any interested individual or group and a copy of any letters from the Attorney General concerning his decision whether to object to a submission. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under §51.12(c) shall not be included in the section 5 file. Investigative reports and internal memoranda shall not be included in the section 5 file.

(b) ....

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Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess ... 19, 20, 4
H. Rep. No. 91–397, 91st Cong., 1st Sess. ... 21, 40, 4
Political Participation, A Report of the United States Commission on Civil Rights, p. 21 (1968) ... 19, 28, 3
The Shameful Blight, A Report of the Washington Research Project, Ch. 5 (1972) ...

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

STATE OF GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (A. 72) is not reported.

JURISDICTION

The judgment of the district court (A. 72) was entered on April 19, 1972. On May 17, 1972, a notice of appeal to this Court was filed under 28 U.S.C. 1253 and 2101(b), and under 42 U.S.C. 1973c. This Court noted probable jurisdiction on October 16, 1972 (A. 77).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973b and 1973c respectively, are set forth in the Appendix to appellants' brief, at pp. 50–53.

QUESTIONS PRESENTED

1. Whether the preclearance requirement in Section 5 of the Voting Rights Act is applicable to reapportionment acts of state legislatures and is constitutional as so applied.

2. Whether the 1971 and 1972 Georgia House of Representatives reapportionment plans were election law "changes" that required submission to the Attorney General under Section 5 of the Act.

3. Whether the Attorney General, in determining whether to interpose an objection to the reapportionment plans involved here, properly placed the burden on the submitting jurisdiction to demonstrate that the plans did not have a discriminatory racial effect on voting.

4. Whether the objections interposed by the Attorney General were timely.

STATEMENT

The material facts are not disputed. Following the 1970 decennial census, the Georgia General Assembly, in the autumn of 1971, reapportioned its legislative (state Senate and House) and congressional districts under three separate reapportionment plans, and, on November 5, 1971, it submitted the plans to the Attorney General of the United States for review, pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973(c) (A. 19).[1] Following a preliminary examination, the Department of Justice "determined that the data sent to the Attorney General [were] insufficient to evaluate properly the changes * * * submitted" (A. 39). On November 19, 1971, David L. Norman, Assistant Attorney General, Civil Rights Division, acting pursuant to 28 C.F.R.

[1] Section 5 provides that States and political subdivisions subject to that Section which "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *," shall before enforcement thereof obtain a declaratory judgment from the United States District Court for the District of Columbia that the new law, regulation or procedure is not racially discriminatory in purpose or effect, or, alternatively, may submit the qualification, prerequisite, standard or procedure to the Attorney General for review. See Appellants' Br. 50–51.

On September 10, 1971, the Attorney General promulgated detailed "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," which serve as procedural and interpretative guidelines for the administration of Section 5. 28 C.F.R. 51.1 *et seq.*

51.18(a),[1] requested the State to provide the Department with additional maps and other information deemed essential for a proper evaluation of all three plans. The letter advised that the 60-day period within which the Attorney General must act on the state plans would commence to run on receipt of the necessary data (A. 39–41).

The requested information was submitted by the State on January 6, 1972 (A. 33, 42–44). On February 11, 1972, the Attorney General interposed an objection to part of the congressional plan, and on March 3, 1972, he objected to various aspects of the legislative plans (A. 9–12). In response to these objections, the Georgia General Assembly adopted modifications to the congressional and state senatorial plans, and, upon resubmission to the Attorney General under Section 5, these plans were approved. They are not involved in the present litigation.

The 1971 reapportionment plan pertaining to the Georgia House of Representatives, which is one of the plans involved here, marked a break with Georgia's long tradition of maintaining the integrity of

[1] The regulation provides. "If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission." Pursuant to 28 U.S.C. 510, the Attorney General has delegated his authority in this area to the Assistant Attorney General in charge of the Civil Rights Division. 28 C.F.R. 0.50.

county boundaries (compare A. 37 with A. 45). As a result of extensive splitting and regrouping of counties within districts, the plan eliminated a significant number of single-member districts, and provided for more multi-member districts (49), a higher proportion of multi-member districts (49 of 105 districts, or 46.7 percent) and a smaller number of House members (180) than any previous House plan in the State's history (A. 10, 17; and compare *Toombs* v. *Fortson,* 241 F. Supp. 65, 68 (N.D. Ga.)).

The Attorney General's letter of objection stated in part (A. 10–11):

> An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement, along with the extensive splitting and regrouping of counties within multimember districts, would occasion a serious potential abridgment of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting.

The letter also pointed out (A. 11–12) that in the east-central portion of the State, the population of which is predominantly nonwhite, the proposed 1971 House plan redrew the "four majority-black, single-member districts in the area" in such a way that they were combined into six districts, only one of which had "a slight nonwhite population majority (50.56 percent)," with the other five "border districts" being located "partly inside and partly outside the majority-nonwhite area,"

giving them "significant, but minority, nonwhite population percentages."

When the Georgia General Assembly received the Attorney General's objections, it promptly repealed the plan submitted on November 5, 1971, and adopted a revised reapportionment plan for the House of Representatives. The new plan (A. 45) redistricted the area in east-central Georgia to increase the number of majority-nonwhite districts there; however, 31 of the 49 multi-member districts under the 1971 House plan were retained, as were the numerical post provision for candidates' qualification and the majority (run-off) requirement for election in primary and general elections (A. 48). On March 9, 1972, the Georgia House of Representatives adopted a resolution (A. 15–18) stating, *inter alia*, that it "lack[ed] the time to satisfy the Attorney General before the upcoming primaries and elections," and resolving "that in order to invoke the remedial powers of the Federal Courts," it would decline to abandon the unaltered aspects of the initial plan which had been considered objectionable (A. 18).

The revised House reapportionment plan (1972 House plan) was submitted to the Attorney General for Section 5 review on March 15, 1972 (A. 33). On March 24, 1972, Assistant Attorney General Norman advised the State "that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (run-off) requirement * * *" (A. 13).

Three days later, the United States commenced the present action in the United States District Court for the Northern District of Georgia under Section 12(d) of the Voting Rights Act, 42 U.S.C. 1973j(d). The suit sought to restrain the State of Georgia from implementing either its 1971 or 1972 House plans in the form submitted to the Attorney General, and by him found to be objectionable, and asked that the state legislature be directed to adopt a satisfactory reapportionment plan "which conforms to the Fourteenth and Fifteenth Amendments of the federal Constitution" (A. 8), or, alternatively, that such a plan be devised by the court "through the appointment of a special master or otherwise" (*ibid.*).

The matter was heard before a three-judge court as required by Section 5 of the Act (A. 73).[1] The State argued: (1) that Congress did not intend Section 5 of the Voting Rights Act to apply to reapportionment acts of state legislatures, and the Constitution does not permit the Act to be so applied; (2) that the 1971 and 1972 House reapportionment plans were in any event not "changes" subject to the provisions of Section 5; (3) that the Attorney General did not apply the appropriate standard in reviewing the House plans submitted to him; and (4) that the objections interposed by the Attorney General were untimely.

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[1] The Section reads in pertinent part (Appellants' Br. 51): "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

At the request of the court, the United States filed an "Interim Report," prepared after consultation with the State (A. 67–71). That Report stated that the Attorney General would no longer object under Section 5 to 10 of the 31 multi-member districts remaining in the 1972 House plan, since they "do not contain cognizable racial minorities within the meaning of the law" (A. 67). Six other multi-member districts containing "larger non-white populations, which probably constitute cognizable racial minorities," were also removed from the objection list because the nonwhite population in those areas is "so diffused that * * * there is no significant dilution of voting strength attributable to multi-member districting * * *" (A. 68). The other 15 multi-member districts, including one in the east central portion of the State, were deemed to "have significant and cognizable nonwhite population concentrations whose inclusion in a multi-member district, in the context of numerical posts and a majority-win (runoff) requirement, would occasion a dilution or abridgment of voting rights on account of race or color" (*ibid.*).

Following a hearing, the court below held, on April 19, 1972 (A. 72–76), that Congress intended Section 5 to apply to state reapportionment acts, and that, as so construed, the Act is constitutional. Without passing on the merits of the proposed plans (A. 75), the court concluded that they constituted "a change from prior Georgia procedures" (A. 73–74); it upheld the Attorney General's objections as timely.

The State was enjoined "from proceeding to hold elections under the present reapportionment plan" (A. 75).[4] The court retained jurisdiction and, at the request of the Speaker of the Georgia General Assembly (A. 64–65), scheduled a hearing for May 3, 1972, to review any new plan submitted by the State (A. 75–76).[5]

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires that covered jurisdictions submit to federal authorities state or local legislation which alters their voting laws, practices or procedures that were in force and effect on November 1, 1964. This Court has on several occasions considered the reach of Section 5 coverage, and each time it has construed the provision to have the broadest possible scope. The legislative history of the Act provides strong support for the conclusion that Congress intended the preclearance requirement to apply to every conceivable legislative change affecting voting. Section 5 was enacted to enforce the protections of the Fifteenth Amendment, and its procedures therefore

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[4] As pointed out by the court below (A. 75), the State could not "revert to its previous apportionment statutes [Ga. Laws 1968, p. 209] since [the court had] already declared that the State is malapportioned thereby and [had] ordered the State to reapportion [*Toombs* v. *Fortson*, 277 F. Supp. 821 (N.D. Ga.)]."

[5] On April 21, 1972, this Court stayed the order of the district court (No. A–1106), and, on May 5, 1972, it denied a motion by the United States to vacate the stay.

embrace all changes in election laws having the potential for abridging voting rights on account of race or color.

The Congress that re-enacted the Voting Rights Act was cognizant of this Court's broad interpretation of the Act's coverage and was specifically aware that reapportionment legislation potentially has a discriminatory racial effect. During the legislative hearings in 1969 and 1970 on whether to extend the life of the 1965 Act through 1975, the practice of changing boundary lines and redistricting was repeatedly cited as one of the new devices being used in some of the covered jurisdictions to dilute the voting power of newly-enfranchised Negroes, and the Attorney General specifically informed Congress that he was administering the Act on the premise that it applies to reapportionment legislation. Congressmen both for and against the five-year extension seemed in general agreement that a change in state apportionment laws would be subject to the preclearance requirement if Section 5 were re-enacted, and proponents of the federal legislation to revitalize that provision considered its re-enactment essential to combat effectively the use of such new weapons of discrimination.

It is thus clear that Congress intended no special exemption from Section 5 coverage when the change in election practices and procedures is effected by reapportionment legislation. Nor does the Constitution bar application of the federal preclearance require-

ment in this context. The several arguments to the contrary that are advanced by the appellants here were fully considered and rejected by this Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301, and there is no reason to reach a different result here.

There remains the largely factual question—decided against appellants below—whether the particular reapportionment plans involved here were "different from [the apportionment] in force or effect on November 1, 1964 * * *" (42 U.S.C. 1973c), so as to require their submission to the Attorney General under Section 5. Since the 1971 and 1972 plans for the Georgia House of Representatives were prompted by the 1970 decennial census, it would have been virtually impossible to draw them along the identical lines of the 1964 plans. But the Georgia General Assembly made no apparent effort to preserve old boundaries. Instead, it abandoned the State's traditional policy of using county lines to identify voting districts. In addition to splitting and regrouping counties, it also substantially reduced the number of single-member districts that had existed in 1964, and substantially increased the number and percentage of multi-member districts across the State. The voting population in most areas and the nature of its representation were both significantly altered. Thus, while some of the 1964 procedures were retained, the legislative seats in the State of Georgia were apportioned under the 1971 and 1972 House plans in a manner

very different from the way they had been apportioned previously. The court below therefore correctly held that these plans constituted a "change" within the meaning of Section 5.

While appellants also seek to challenge the objections interposed by the Attorney General to the Georgia House reapportionment legislation on grounds that his determination was based on an erroneous standard and was not timely made, this Court has plainly indicated that such questions are not to be litigated in cases of this sort. Even so, the arguments on these subsidiary points are without substance.

Contrary to appellants' position, the language of Section 5, its legislative history, and the Attorney General's regulations promulgated thereunder, all make it clear that the burden of proof is on the submitting jurisdiction to demonstrate that its legislative change does not have a discriminatory racial effect on voting. Moreover, in meeting that burden, if the State's initial submission lacks relevant information that is necessary to a proper evaluation of its effect on the newly-enfranchised Negro voters, and an itemized request is promptly made by the Department of Justice for the additional information needed, the 60-day statutory period within which the Attorney General is to make an informed decision properly commences to run only after the new materials, completing the State's submission, have been furnished. In any event, the timeliness challenge here relates only to the now repealed 1971 plan, and the issue is therefore moot.

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT IS APPLICABLE TO STATE REAPPORTIONMENT LEGISLATION AND IS CONSTITUTIONAL AS SO APPLIED

The State of Georgia is one of seven States to which the provisions of Section 4(a) of the Voting Rights Act (42 U.S.C. 1973b(a)) are applicable (30 Fed. Reg. 9897); it is therefore prohibited under Section 5 of the Act (42 U.S.C. 1973c) from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting such change to the Attorney General of the United States for review, or, alternatively, securing a favorable declaratory judgment from the United States District Court for the District of Columbia.

In this case, the Georgia General Assembly submitted to the Attorney General for review its proposed 1971 reapportionment plans "pursuant to § 5 of the Voting Rights Act * * * and the regulations [thereunder]" (A. 19). Two of the plans were not objected to; the other was. The Attorney General's objections to the 1971 House plan was not satisfied in the substituted 1972 House plan adopted by the Georgia General Assembly and also submitted under Section 5. Having failed to satisfy the Attorney General that its House plans do not have "a discriminatory racial effect on voting" (A. 10–11), the State now takes the position that

its submissions under Section 5 were in error because that statutory provision was not intended to reach reapportionment legislation; it further contends that the contrary construction of the Act by the court below is unconstitutional. In both respects, we disagree.

A. The Review Procedures in Section 5 of the Voting Rights Act Apply to State Reapportionment Legislation

1. In determining the reach of Section 5 coverage, this Court is not called upon to write on a clean slate. In 1968, the applicability of the Voting Rights Act approval requirements to new voting procedures enacted by the States of Mississippi and Virginia was established in *Allen* v. *State Board of Elections*, 393 U.S. 544, and three companion cases.[4] There the Court explicitly rejected "a narrow construction" of Section 5, pointing out that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race" (393 U.S. at 565; footnote omitted). Consistently with the overriding purpose of the federal legislation "to rid the country of racial discrimination in voting" (393 U.S.

[4] *Fairley* v. *Patterson*, No. 25; *Bunton* v. *Patterson*, No. 26; *Whitley* v. *Williams*, No. 36 (all October Term, 1968). The changes in the state election laws held in these cases to come within Section 5 coverage were: (1) changes from district to at-large voting for county supervisor; (2) changes from election of county superintendents of education to the appointment of such officials; (3) changes in the requirements for independent candidates running in general elections; and (4) changes in procedures for casting write-in votes.

at 548), the Court determined that Congress intended Section 5 to be given "the broadest possible scope" (393 U.S. at 567). "The legislative history on the whole supports the view," it stated (393 U.S. at 566), "that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." And see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315–316.

The clear implication of *Allen* is that reapportionment laws adopted by the legislatures of these States are included within the broad coverage of the Act's preclearance requirements. Indeed, in addressing itself to the specific question presented in one of the cases before it, the Court in *Allen* used language which is equally applicable to the State's use of multimember districts in the reapportionment plan disapproved by the Attorney General in the present case:

> No. 25 involves a change from district to at-large voting for county supervisors. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting. [393 U.S. at 569.]

In speaking specifically of reapportionment, the Court in *Allen* stated that Section 5 preclearance in the con-

text of reapportionment might present "some administrative problem[s]" that could well be the subject of future litigation (see *infra*, pp. 25–27); but it indicated that such a prospect affords no basis for giving the statute "a narrow scope" when dealing with reapportionment legislation (393 U.S. at 569).

2. The foregoing quotation from *Allen* reaffirmed that the right to vote can be curtailed "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555. When state apportionment or districting arrangements are devised so as to dilute and impair the votes cast by newly-enfranchised Negroes—as, for example, was the case here in east-central Georgia under the 1971 House reapportionment plan—they not only contravene the equal protection requirements of the Fourteenth Amendment, but also violate the Fifteenth Amendment prohibition against racial discrimination in voting. Compare *Gomillion* v. *Lightfoot*, 364 U.S. 339, with *Wright* v. *Rockefeller*, 376 U.S. 52; and see *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala.). It matters not whether boundaries are changed to eliminate districts having a majority, or substantial minority, nonwhite population (cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 3), or the State resorts to the device of multi-member districts "to minimize or cancel out the voting strength of racial * * * elements * * *" (*Fortson* v. *Dorsey*, 379 U.S. 433, 439; *Burns* v. *Richardson*, 384 U.S. 73, 88). The Fifteenth Amendment condemns "sophisticated as well as sim-

ple-minded modes of discrimination" (*Lane* v. *Wilson*, 307 U.S. 268, 275; *Gomillion* v. *Lightfoot*, *supra*, 364 U.S. at 342).[1]

Since the Voting Rights Act was intended to make effective the protections of the Fifteenth Amendment, its reach is no less inclusive. Precisely because "some of the States covered by § 4(b) of the Act had resorted to the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" (*South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 335), Congress prescribed in Section 5 "the suspension *of all new voting regulations* pending review by federal authorities to determine whether their use would perpetuate voting discrimination" (*id.* at 315-316; emphasis added). The statutory approval procedure was designed to serve an informing function—to provide "a method of bringing to the attention of the Government changes in State law."[2]

3. It is true, as appellants suggest, that the legislative history of the 1965 Act contains few references to state reapportionment legislation. But, as this Court recognized in *Allen* (393 U.S. at 568), the fact that Congress did not discuss every conceivable type of change within the broad scope of Section 5 provides

[1] For an informative discussion of the manner in which state reapportionment and redistricting has been used to dilute the Negro vote, see *The Shameful Blight*, A Report of the Washington Research Project, Ch. 5 (1972).

[2] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., p. 72 (hereafter referred to as *1964 House Hearings*).

no basis for limiting that provision's coverage only to those changes specifically mentioned in the congressional hearings (see, *e.g.*, *1964 House Hearings*, pp. 60–62). The preclearance requirement was enacted with full recognition of the admonition given by then Attorney General Katzenbach that "there are an awful lot of things that could be started for purposes of evading the 15th Amendment * * *" (*1964 House Hearings*, p. 95), and the language used "was intended to be all-inclusive of any kind of practice" (Hearings before the Senate Committee on the Judiciary on S. 1564, 89th Cong., 1st Sess., p. 192).[9]

Moreover, at the time of the legislative hearings on the 1965 Act, the use of reapportionment as a weapon of discrimination may not have been fully appreciated by the Congress. It was not until June 15, 1964, that this Court announced its landmark decision in *Reynolds* v. *Sims*, *supra*, condemning the practice of unequal apportionment of state legislative seats. And the *Reynolds* principle was not applied to political subdivisions within the States until 1968, in *Avery* v. *Midland County*, 390 U.S. 474. The *Allen* decision followed a year later.

It is highly pertinent here, however, that the significance of these decisions was specifically discussed

[9] To allay any doubts on this score, Congress, concerned that the word "procedure" was alone "not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote" (*Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 566), expanded the language in the final version of Section 5 to include any "voting qualification or prerequisites to voting, or standard, practice, or procedure" (42 U.S.C. (1964 ed., Supp. I) 1973c).

in the Congress when, in 1969 and 1970, it considered whether to extend the life of the 1965 Act, including Section 5, from 1970 to 1975. During Senate and House hearings on the proposed extension, this Court's broad construction of Section 5 in *Allen* was a focal point of discussion.[10] And, of particular relevance here, an 18-month study of the operation of the Voting Rights Act of 1965 by the United States Civil Rights Commission, which was before both Houses in 1969, pointed out that "such measures as conversion from elections by district to elections at-large, laws permitting the legislature to consolidate predominantly Negro counties with predominantly white counties, and reapportionment and redistricting statutes" were among the new devices being used in the South to dilute the votes of the increasing number of Negroes registering since enactment of the 1965 Act.[11] The staff director of the Commission, Mr. Howard A. Glickstein, made the same point in testifying at the House hearings (*1969 House Hearings,* p. 17; and see *1969–1970 Senate Hearings,* pp. 47, 427).

Both proponents and opponents of the five-year extension agreed that, in light of *Allen,* such legislative

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[10] See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, H.R. 5538, and Similar Proposals, 91st Cong., 1st Sess. (hereafter *1969 House Hearings*), pp. 1, 4, 18, 62, 133, 147–148, 154, 183–184, 402–454. See also Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess. (hereafter *1969–1970 Senate Hearings*), pp. 48, 195–196, 369–370, 397, 426–427.

[11] *Political Participation*, A Report of the United States Commission on Civil Rights, p. 21 (1968).

changes plainly came within the scope of the preclearance requirements of Section 5. Mr. Joseph L. Rauh, Jr., General Counsel of the Leadership Conference on Civil Rights, for example, testified before the Senate Subcommittee on Constitutional Rights that changes in "electoral areas so * * * [as to] avoid a voting pattern where a Negro could be elected" are subject to "approval [by] the Attorney General or the district court [of the District of Columbia]" (*1969–1970 Senate Hearings*, p. 132). Congressman McCulloch expressed the same view in the House hearings (*1969 House Hearings*, pp. 3–4; and see *id.* at 150 (remarks of Thomas E. Harris, Associate General Counsel, AFL–CIO)). And it is particularly significant that an official of the Department of Justice specifically advised Congress that the Attorney General in his administration of the Act was of the view "that, from court decisions, all these redistricting plans are going to have to be submitted to the Attorney General for his approval because they are voting changes" (*1969–1970 Senate Hearings*, p. 507; David L. Norman, then Deputy Assistant Attorney General, Civil Rights Division)."[11]

Nor did those who testified in behalf of the affected states and political subdivisions ascribe to Section 5

[11] As the Court pointed out in *Perkins* v. *Matthews*, 400 U.S. 379, 391, with reference to the above testimony, "'this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)." See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *United States* v. *City of Chicago*, 400 U.S. 8, 10. There is, of course, all the more reason to defer to this interpretation with respect to the re-enacted statute, which Congress chose to extend unchanged after having been specifically informed of the Attorney General's view.

any narrower scope. To the contrary, their opposition to extending the life of the Act beyond 1970 was grounded in part on the fact that the reach of Section 5 under the *Allen* decision included boundary and district changes of the sort involved here. See, e.g., *1969 House Hearings*, pp. 131–133 (remarks of Mississippi Attorney General Summer). Warning of the "onerous burden" placed on covered jurisdictions because the "1970 census (and recent Supreme Court rulings) will probably require the passage of reapportionment and redistricting acts in all seven states," the opposition complained that under the Act federal approval would be required "to use the left bank of a particular river instead of a certain section line in redefining the boundaries of one of their State's senatorial districts." H. Rep. No. 91–397, 91st Cong., 1st Sess., p. 22 (dissenting views of Hon. Walter Flowers).

The debates on the floor not only contain repeated references to *Allen*,[11] but also show that Congress, in deciding to extend the life of the Voting Rights Act of 1965 an additional five years (Public Law 91–285, 84 Stat. 314), was specifically aware that its decision would affect reapportionment legislation adopted by the covered States. When the question of the 1970 extension was before the Senate, changes in boundary lines and consolidation of counties were repeatedly

[11] See, *e.g.*, 116 Cong. Rec. 6173 (Sen. Hart); *id.* at 6356, 6358 (Sen. Bayh); *id.* at 5546, 6519 (Sen. Ervin)); *id.* at 5521, 5526–27 (Joint Statement of 10 members of Senate Judiciary Committee). *Allen* was also cited in the House Committee Report. See H. Rep. No. 91–397, 91st Cong., 1st Sess., pp. 8, 10.

referred to as among the new "obstructionist weapons" being used to dilute the recently-enfranchised Negro voters. See, *e.g.*, 116 Cong. Rec. 5520 (Joint Statement of 10 members of Senate Judiciary Committee); 116 Cong. Rec. 6168 (Sen. Scott).[14] "[R]eapportionment, redistricting, rearranging of wards, rearranging of commissioner districts * * *" were all understood to be election-law changes subject to prior review by the Attorney General. 116 Cong. Rec. 7105 (Sen. Allen). The emergence in the intervening 5 years of such practices, as well as other "'disingenuous technicalities and changes in * * * election laws,'" to circumvent the Act, was, indeed, one of the principal reasons given for the need "to extend section 5 with its preclearance obligation." 116 Cong. Rec. 5534-5535 (Sen. Hart). And not once in the course of the debates did any Senator or Representative question or contradict the apparent general understanding that the Act, if extended unchanged, would apply to the reapportionments resulting from the 1970 census.

4. Only two Terms ago, this Court, in *Perkins* v. *Matthews*, 400 U.S. 379, took note of the legislative history of the Voting Rights Act Amendments of 1970 in rejecting a challenge by a political subdivision of a covered State to requiring the submission of its proposed "changes in the municipal boundaries through annexations of adjacent areas" (400 U.S. at 382) to the

[14] The same point was made by Congressman McCulloch on the floor of the House. 116 Cong. Rec. 38486.

Attorney General for preclearance.[18] In holding that such changes were within the intended broad scope of Section 5 coverage, the Court stated (400 U.S. at 388–389):

> Clearly, revision of boundary lines has an effect on voting * * *. Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), provides a clearcut illustration of the potential of boundary changes for "denying or abridging the right to vote on account of race or color."

That, we believe, is precisely the point to be made here with respect to the 1971 and 1972 House reapportionment plans proposed by the State of Georgia. Just as this Court pointed out in *Perkins* (400 U.S. at 390) that "[i]n terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation that changes both the boundaries and ward lines of a city to include more voters," so, too, a reapportionment plan that alters the state districting lines in such a way as to merge cognizable racial minorities into multi-member districts, and also requires that each candidate run for a stated post and win by a majority vote of the entire district, cannot, we submit, be differentiated. See *Perkins* v. *Matthews*, *supra*, 400 U.S. at 391–392 n. 10. The potential for infringing the protections

[18] The case also involved changes in the location of polling places and, of significance here, changes from ward to at-large elections of aldermen; these, too, were held to be within the broad coverage of Section 5.

guaranteed by the Fifteenth Amendment is no less real in the latter instance than it is in the two former situations." And it was to guard against just such infringements of the voting rights of "millions of non-white Americans" (*South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 337) that Congress initially enacted, and subsequently extended, the Section 5 preclearance requirements.

5. In light of *Allen* and *Perkins*, reapportionment legislation adopted by the affected States, or their political subdivisions, has generally been considered "a state enactment which alters the election law of a covered State" (400 U.S. at 388), within the broad coverage of Section 5. See, *e.g.*, *Sheffield* v. *Itawamba County Board of Supervisors*, 439 F. 2d 35 (C.A. 5); *Howell* v. *Mahon*, E.D. Va., C.A. No. 105–71N, decided May 24, 1971. Cf. *Taylor* v. *McKeithen*, 407 U.S. 191. For the most part, the seven covered States have in recent years followed the course taken by the State of Georgia in the present case and submitted to the Attorney General such proposed changes.[17] As Assistant General Norman testified in the May 1971 Hearings before

[16] For this reason, the fact that state reapportionment legislation might have been partially motivated by this Court's reapportionment decisions affords no more basis for excepting the plans from Section 5 scrutiny than is afforded when the moving force behind passage of such legislation is "an attempt to comply with the provisions of the Voting Rights Act." See *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 565 n. 29.

[17] In its 1971 submission, the State of Georgia stated that its 1968 reapportionment plan had not been submitted to the Attorney General "because at that time, prior to *Allen* v. *Board of Elections*, 393 U.S. 544 (1969), it was believed to be unnecessary to submit reapportionment plans to the United

the Civil Rights Oversight Committee on the Enforcement of the Voting Rights Act (Subcommittee No. 4 of the House Committee on the Judiciary, 92d Cong., 1st Sess.), this Court's expansive interpretation of Section 5 first announced in *Allen*, and later reaffirmed in *Perkins*, "coupled with the 1970 decennial census which necessitates reapportionment and redistricting almost everywhere, has led to a substantial increase in the submissions to the Attorney General" (*id.* at p. 7)."

In processing these many state and local reapportionment plans, the Attorney General has been cognizant of the potential "administrative problem" to which this Court alluded in *Allen* (393 U.S. at 569). In some instances, a reapportionment submitted to the

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States Attorney General pursuant to the Voting Rights Act of 1965" (A. 21). Following this Court's decisions in *Allen* and *Perkins*, however, the State of Georgia submitted, "pursuant to § 5 of the Voting Rights Act of 1965 * * * and the regulations promulgated * * * [thereunder]" (A. 19), not only its 1971 and 1972 House reapportionment plans, but also its congressional and state senate plans; moreover, when the Attorney General interposed objections to the latter two plans, they were modified by the Georgia General Assembly to meet the objections and resubmitted for approval (*supra*, p. 4).

[15] In addition to the submissions by the State of Georgia, legislative and congressional districting plans have been submitted by Louisiana, Mississippi (congressional only), North Carolina, South Carolina, and Virginia. (Alabama and the Mississippi Legislature were reapportioned pursuant to federal court orders; see p. 26, *infra*.) As of December 1, 1972, a total of 351 reapportionment plans have been presented to the Attorney General for Section 5 approval since 1969; 351 of these involve local government bodies, such as counties, parishes and municipalities.

Department of Justice for preclearance has, at the time of submission, also been the subject of pending litigation." In order to avoid a possible conflict, the Department of Justice and the federal courts have developed complementary procedures designed to effectuate the intent of Congress that there be judicial or administrative pre-implementation review of all changes covered by Section 5.

Thus, where a reapportionment plan has been prescribed, not by the legislature of an affected State, or its political subdivision, but by a federal court, that judicial plan is not to be reviewed by the Attorney General. As this Court stated in *Conner* v. *Johnson*, 402 U.S. 690, 691: "A decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act." Moreover, when a district court is simultaneously considering a challenge to reapportionment on Fifteenth Amendment grounds, the Attorney General's policy has been to defer to the judicial determination concerning whether the particular plan submitted for preclearance has a racially discriminatory effect on voting.[20]

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[19] Of the 381 reapportionments considered by the Attorney General since 1969, 42 involved redistricting litigation in which Fifteenth Amendment questions were raised, and another 39 involved redistricting plans being litigated solely on Fourteenth Amendment grounds. The Attorney General has interposed objections to 53 of the 381 submissions: in 19 of these instances the objections related to planned reapportionments involved in lawsuits when the plans were submitted for the Attorney General's consideration.

[20] That policy is presently being contested in *Harper* v. *Kleindienst*, D.D.C., Civ. Action No. 1607-72.

The pragmatic efforts of both the Attorney General and the federal courts to achieve the required review are further evidenced by the sequence of events in this case. When the Georgia Legislature was unable to devise a House plan acceptable to the Attorney General, the issue was submitted to the court below, which had earlier ordered reapportionment,[21] with the assurance that the Attorney General would not thereafter undertake independent Section 5 review of any modifications approved by the court (A. 57). Precisely because of this sort of cooperation, the potential for conflict between the reviewing agency and the courts in scrutinizing state reapportionment laws has been reduced significantly.[22] The "administrative problem" has thus proved to be entirely manageable in the application of Section 5 to reapportionment matters.

B. Application of Section 5 to Reapportionment Legislation of the Covered States Is Constitutional

Appellants contend that Section 5 cannot constitutionally be applied to state reapportionment plans.

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[21] In *Toombs* v. *Fortson*, 277 F. Supp. 821, 823 (N.D. Ga.), the court below had approved apportionment plans "for use pending receipt of the 1970 census which means, as a practical matter, until the 1972 primaries and general election. As we have made clear previously, the General Assembly must be reapportioned after each decennial census."

[22] In several instances, district courts considering reapportionment matters have withheld approval of the state legislation pending submission to, and a decision by, the Attorney General under Section 5. See, *e.g.*, *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La.), affirmed, 457 F. 2d 796 (C.A. 5); *Bacote* v. *Carter*, 343 F. Supp. 330 (N.D. Ga.); *Howell* v. *Mahan*, *supra*.

But they suggest no convincing reason why this statutory provision, which has withstood constitutional attack with respect to its application to all other election-law changes (see *South Carolina* v. *Katzenbach*, *supra*; *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 548), suddenly becomes vulnerable to the identical arguments when made in a reapportionment context.

This Court, in *South Carolina* v. *Katzenbach*, carefully considered the constitutionality of the Section 5 approval requirement and determined that it was "an appropriate means for carrying out Congress' constitutional responsibilities and * * * consonant with all other provisions of the Constitution" (383 U.S. at 308). As we have pointed out (pp. 15-17, *supra*), use of apportionment and districting changes to deprive the Negro voter of casting a meaningful ballot—which is not unknown in some of the covered States and their political subdivisions (see *Political Participation*, *supra*, pp. 21-23)—is a practice as much condemned by the Fifteenth Amendment as the racially discriminatory tests, devices and boundary changes involved in *South Carolina*, *Allen* and *Perkins*. Compare *Gomillion* v. *Lightfoot*, *supra*, 364 U.S. at 347. It, too, has been recognized by Congress as a potential form of frustration and impairment of the right to vote, and is properly subject to that body's "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 326.

Contrary to appellants' apparent assertion, subjecting the Georgia reapportionment to the Attorney Gen-

eral's scrutiny under Section 5 does not deny the State the opportunity to devise its own boundary changes and districting plans. The statutory preclearance requirement is designed solely to insure that reapportionment legislation of the covered States and their political subdivisions comports with "the commands of the Fifteenth Amendment" (see *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 337). In performing his review function, the Attorney General does not himself redraw boundary lines or alter the legislative scheme in such a way as to "bypass the State's formal judgment as to the proper size of its legislative bodies" (*Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 198). To the contrary, when he interposes an objection on the ground that the State has failed to demonstrate that the reapportionment plan does not have a racially discriminatory effect on voting, the submitting jurisdiction is free to modify it in any manner it wishes to satisfy the objection. And where, as here, certain aspects of the modified plan are still unsatisfactory, the issue is taken to the federal courts which must "accommodate the relief ordered to the appropriate provisions of state statutes relating * * *" to the contested aspects of the reapportionment (*id.* at 197).

Moreover, the fact that these procedures apply only to seven States and their political subdivisions does not render them unconstitutional. "In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary" (*South Carolina* v. *Katzenbach, supra*, 383 U.S. at 328). As we have indicated (*supra*,

pp. 19-22), in some of these areas reapportionment and redistricting statutes were employed as a "new device" to circumvent the 1965 Act (see *Political Participation, supra,* p. 21). Such efforts are precisely the target at which Section 5 is aimed. Thus this Court's observation in *South Carolina* v. *Katzenbach,* 383 U.S. at 335, is particularly relevant in the present context: "Congress had reason to suppose that these [covered] States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."

II. THE 1971 AND 1972 PROPOSED REAPPORTIONMENTS FOR THE GEORGIA HOUSE OF REPRESENTATIVES DIFFER SUBSTANTIALLY FROM THE MANNER IN WHICH THE STATE LEGISLATIVE SEATS WERE APPORTIONED ON NOVEMBER 1, 1964

Appellants also contend that, whatever the general application of the Voting Rights Act in the reapportionment context, the 1971 and 1972 House plans involved in this case are not covered by Section 5 because the proposed schemes do not markedly differ from the apportionment of state legislative seats in effect on November 1, 1964, which is the applicable statutory date of comparison.[22] Their position understandably is not that the new plans are identical to the old, for they admit that "the application of many

[22] Section 5 requires, *inter alia*, the submission of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *" (Appellants' Br. 50).

[but not all] multi-member districts had changed * * *" (*Appellants'* Br. 29; see also A. 50–51). Rather, the argument appears to be that the alteration is not sufficiently comprehensive to warrant invoking the Section 5 preclearance requirement.

This argument is, as the district court held (A. 74), "not well founded." We have shown that Congress did not intend the application of Section 5 to turn on whether the "change" in question is significant or insignificant, large or small, subtle or obvious. This Court made it abundantly clear in both *Allen* (393 U.S. at 568) and *Perkins* (400 U.S. at 387), that "Congress chose not to include even * * * minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." That, in itself, sufficiently answers appellants' claim.

Moreover, the changes here involved far more than insubstantial technicalities. In 1971 and 1972, the Georgia General Assembly adopted reapportionment plans for the state legislature that were fundamentally different from the 1964 Georgia procedures (see A. 34–35). For the first time, it departed from the policy that had theretofore been uniformly followed throughout the State of using county lines to define the basic election unit (A. 10).[21] Instead, legislative

[21] Even under the court-ordered interim plan of 1968 (see n. 21, *supra*), the State had adhered to its policy of defining legislative districts by county lines (A. 37); this had resulted in an increase in the number of multi-member districts to meet the requirements of the Equal Protection Clause. But see n. 25, *infra*.

districts were redrawn so that, under the 1971 plan (A. 38), almost half (52 of 105) of the districts were made up of one or more portions of counties, and, when that plan was modified in 1972, only 7 of 128 districts did not cross county lines (A. 45).

Contrary to the expected reduction of multi-member districts that frequently accompanies a patchwork redistricting of the sort involved here, the Georgia House plans actually provided for an increase in the number of multi-member districts. Comparing the 1971 plan (180 members to be elected from 105 districts) with the legislative apportionment in 1964 (205 members to be elected from 159 districts), more than half of the 121 single-member districts (65) that existed in 1964 were eliminated by the new plan. The 49 multi-member districts contemplated in the 1971 reapportionment plan (as compared with 38 in 1964) were composed of 29 two-member districts (compared with 30 in 1964), 16 three-member districts (compared with 8 in 1964), 3 four-member districts (compared with 0 in 1964), and 1 six-member district (compared with 0 in 1964). See *Toombs* v. *Fortson*, 241 F. Supp. 65, 68 (N.D. Ga.).

In addition, under the new scheme, the number of members elected from legislative districts having a majority-nonwhite population would be half (17) the number elected from such districts in 1964 (34). As we stated earlier (*supra*, pp. 5–6), in the east-central area of the State alone, seven counties having a black-majority population, each represented by one member of the House in 1964, were carved up into six new districts in 1971,

and only one of those districts could claim a slight (50.56 percent) black majority (A. 11–12).

When the Attorney General interposed his objections to the 1971 plan, the Georgia General Assembly in 1972 redrew district lines in the east-central portion of the State, not along county lines as in 1964, but in a fashion which would, compared to the 1971 plan, preserve more effectively the voting strength of the nonwhite population in the area (A. 45, 48). While many objectionable features still remained in the 1972 modification (see n. 27, *infra*), what is relevant here is that the resubmitted plan also differed significantly from the plan in effect on November 1, 1964. It provided for 180 members to be elected from 128 districts. Counties and parts of counties were regrouped to form 96 single-member districts (as compared with 121 in 1964), 17 two-member districts (as compared with 30 in 1964), 12 three-member districts (as compared with 8 in 1964), 2 four-member districts (as compared with 0 in 1964), and 1 six-member district (as compared with 0 in 1964).[28]

We therefore believe that the 1971 and 1972 submissions by the State of Georgia "pursuant to § 5 of the Voting Rights Act of 1956 * * *" (A. 19) were entirely proper; the proposed plans unquestionably ap-

[28] Under the interim plan approved in *Toombs* for the 1968 election, 195 members were elected from 118 districts; there were 71 single-member districts and 47 multi-member districts. In the latter category were 29 two-member districts; 11 three-member districts; 4 four-member districts, 2 five-member districts, and 1 seven-member district. Twenty-one members of the state legislature were elected from districts having a majority-non-white population.

portioned the state legislative seats in a manner "different from that in force or effect on November 1, 1964" (42 U.S.C. 1973c). This is not to say that the submitted reapportionment plans were wholly dissimilar to the 1964 Georgia procedures. As appellants point out (Appellants' Br. 26), the State's earlier requirements that each candidate run for a stated post and win by a majority vote of the entire district were retained. And the multi-member district concept had long been a part of Georgia's apportionment scheme (Appellants' Br. 29–30). But in devising its House plans for 1971 and 1972, the Georgia General Assembly did not designate as multi-member districts the same ones that had existed in 1964; it did not save the single-member districts that had then been defined by county boundaries. Rather, it abandoned its past policy and proposed, instead, an extensive splitting and regrouping of counties that would have given the state legislature a whole new cast; legislative districts were completely redrawn so that both the district population and the nature of its representation would be substantially altered.

It need only be added that appellants' effort to remove these "changes" from Section 5 coverage on the ground that they could not properly be objected to by the Attorney General (Appellants' Br. 28–30) misses the essential point of inquiry.[26] As this Court

[26] Appellants suggest that the Attorney General's objections to the 1971 and 1972 House plans were based on a misconception that the law prohibited the use of multi-member districts *per se*. The objection letters themselves, however, clearly reflect that the Department of Justice was concerned only with dis-

pointed out in *Perkins* v. *Matthews*, *supra*, 400 U.S. at 385, "the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race

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criminatory effect in the particular context of the submitted House plans (see pp. 5–6, *supra*). Many counties and single-member and multi-member districts contained cognizable racial minorities under prior reapportionments, the voting strength of which would be significantly diluted by merging them into a larger multi-member district where each candidate would be required to run for a stated post and win by a majority vote of the entire district.

While specific districts were not particularized in the objection letters, that is not at all unusual. Under Section 5, the Attorney General has authority only to object or not object to a submission; he is not responsible for devising an alternative reapportionment for the State and is not authorized to do so When, at the request of the court below, the Attorney General advised that 15 multi-member districts were a continuing source of objection, that was not a "corrective maneuver," as appellants now suggest (Br. 28). The specification was made "following consultations between attorneys for the United States and for the State of Georgia" (A. 67) in an effort to work out an accommodation that would permit a satisfactory solution to the reapportionment problem before the district court with minimal disruption to Georgia's proposals. Thus, the Attorney General agreed to withdraw his objections to ten multi-member districts since they did not contain "cognizable racial minorities" (A. 67) and to six other multi-member districts having "cognizable racial minorities" because "the non-white population is so diffused" (A. 68). But the fact that the Attorney General agreed with the State of Georgia to permit these 16 multi-member districts, if the State would "subdivide into single-member districts [the remaining] fifteen multi-member districts" (A. 69) under its 1972 plan, in no way undercuts the original objections interposed on the general ground that, based on the State's submissions under Section 5, the Attorney General could not certify that the House plans were without racially discriminatory effect.

or color'" is one that "Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General."[*] Thus, the court below properly declined to "pass on the merits of the Georgia reapportionment plan" (A. 75). This suit presents "only [the] issue * * * whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement" (*id.* at 383; *Allen* v. *State Board of Elections, supra*, 393 U.S. at

[*] The Attorney General interposed objections to the two House plans involved here on the ground that "the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgment of minority voting rights" (A. 10–11). As this Court observed in *Whitcomb* v. *Chavis*, 403 U.S. 124, 143, multi-member district systems "may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" And see *Bussie* v. *Governor of Louisiana*, 333 F. Sup. 452 (E.D. La.), affirmed as to the invalidity of multi-member districts, 457 F.2d 796 (C.A. 5); *Sims* v. *Amos*, M.D. Ala., C.A. No. 1744–N, decided January 3, 1970. Moreover, when multi-member district plans also include stated post and majority (runoff) requirements they become particularly suspect. See *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Texas); *Dunston* v. *Scott*, E.D. N.C., No. 2666—Civil, decided January 10, 1972, slip op. 17 n. 9. Compare *Stevenson* v. *West*, D.S.C., C.A. No. 72–45, decided April 7, 1972.

If the State of Georgia is of the view that the Attorney General's objections were unwarranted, either partially or in their entirety, its recourse is to seek "a declaratory judgment that its new voting laws do not have a discriminatory purpose or effect" (*Allen* v. *State Board of Elections, supra*, 393 U.S. at 555 n. 19).

558-559). And for the reasons we have already discussed above, that question, considered in the context of the 1971 and 1972 reapportionment plans of the Georgia House of Representatives, was correctly answered in the affirmative by the district court (A. 73-74).

III. THE ATTORNEY GENERAL PROPERLY PLACED THE BURDEN OF PROOF ON THE STATE OF GEORGIA TO DEMONSTRATE THAT ITS HOUSE PLANS WOULD NOT HAVE A DISCRIMINATORY RACIAL EFFECT ON VOTING

In his March 3, 1972 letter of objection, Assistant Attorney General Norman, after advising that he was persuaded "a court would conclude" that the 1971 Georgia House plan "would occasion a serious potential abridgment of minority voting rights," informed the State that he therefore was "unable to conclude that the plan does not have a discriminatory racial effect on voting" (A. 10-11).[28] Because the objection is formulated in negative terms, appellants argue that it is based, not on an affirmative finding of voting discrimination against minorities, but on the failure of the State to demonstrate satisfactorily that its 1971 reapportionment plan is free of such a discriminatory effect. Placing the burden of proof on the submitting

[28] In the letter of March 24, 1972, objecting to the 1972 House plan, Assistant Attorney General Norman wrote (A. 13): "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement * * *."

jurisdiction, they contend, is without statutory basis and contrary to the legislative intent.

The burden of proof question raised here was not considered by the court below, and, we think, for good reason. As we have pointed out, in a suit of this nature the sole issue to be litigated is "whether the new legislation must be submitted for approval" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 555–556 n. 19; *Perkins* v. *Matthews, supra,* 400 U.S. at 384). Matters unrelated to that issue such as the standard of review used by the Attorney General, the timeliness of his objection (see pp. 42–45, *infra*), or whether the Attorney General's objections were properly interposed, are all outside the permissible scope of judicial inquiry in this procedural context, and thus are not now entitled to consideration by this Court.

Appellants' position on this point is, in any event, without substance. Section 5 provides alternative procedures for the covered States to follow to obtain approval of any change with respect to a voting "qualification * * * standard, practice, or procedure" (42 U.S.C. 1973c). They can, as we have indicated, seek a favorable declaratory judgment in the United States District Court for the District of Columbia, or they can submit the proposed change to the Attorney General. If the judicial route is chosen, this Court held in *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 335, that "the burden of proof [is] on the areas seeking relief."

Nothing in the statute even remotely suggests that the covered jurisdiction is to be relieved of this burden if it chooses the alternative course and makes its

submissions to the Attorney General. To the contrary, this procedure was included in Section 5 as an accommodation to the covered States, providing them with a more accessible and rapid means of implementing their proposed new state election laws. See *Allen* v. *State Board of Elections, supra,* 393 U.S. at 549. If review by the Attorney General is sought, it is recognized that Congress similarly "presumes—a presumption which the Court upholds—that state statutes regulating voting are discriminatory and enjoins their enforcement until the State can convince * * * [the designated federal] officials that the statute is not discriminatory" (*Perkins* v. *Matthews, supra,* 400 U.S. at 406; Black, J., dissenting). And see *Evers* v. *State Board of Election Commissioners,* 327 F. Supp. 640 (S.D. Miss.), appeal dismissed, 405 U.S. 1001.

Appellants agree (Appellants' Br. 32–34) that Section 5 has consistently been so construed by the Attorney General in administering the Act (see n. 12, *supra*). The regulatory "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," promulgated September 10, 1971, after enactment of the 1970 Amendment extending the life of the Act an additional five years, specifically provide in relevant part (Sec. 51.19) that "the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia" (see Appellants' Br. 60).

Contrary to appellants' assertion, this is precisely what Congress intended. Indeed, in the 1969–1970 legislative deliberations with respect to re-enactment

of the Section 5 approval procedures for another five years, much of the discussion by those both for and against the statutory extension centered on the fact that it was the States, rather than the Attorney General, which were required by Section 5 to carry the burden of proof upon submission of a change for administrative approval. Thus the majority report of the House Committee on the Judiciary, which strongly favored retention of the preclearance provision through 1975, stated (H. Rep. No. 91-397, 91st Cong., 1st Sess., p. 8):

> The [*Allen*] decision underscores the advantage Section 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color. * * * Failure to continue this provision of the Act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote."[19]

On the other hand, the minority report of the House Judiciary Committee regarded the allocation of the burden of proof under Section 5 as a point in its favor. It, too, construed the provision as imposing the burden on the submitting authority, but cited that as a reason for terminating the preclearance proce-

[19] See also the statement of Committee Chairman Emanuel Celler on the floor of the House to the effect that the statutory provision "* * * places the burden of proof on the covered jurisdiction" (115 Cong. Rec. 38132). And see *1969 House Hearings*, pp. 82, 86, 148, 270.

dure. See H. Rep. No. 91-397, 91st Cong., 1st Sess., pp. 14, 21, 22.

In this regard, the positions taken in the Senate by the proponents of the 1970 legislation, and by their opposition, were essentially no different. A statement by ten members of the Senate Judiciary Committee in favor of extending the 1965 Act an additional 5 years, which was read during the floor debate, itemized as one of the decided benefits of Section 5 that it placed the "burden of proving the nondiscriminatory purpose and effect * * * on the governmental authority seeking exemption * * *" (116 Cong. Rec. 5518); this requirement, it pointed out (116 Cong. 5519), "in effect freezes election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." To eliminate the preclearance provision, and revert back to civil litigation as the sole means of enforcing the Fifteenth Amendment, would, the statement warned (116 Cong. Rec. 5523), "shift the all important burden of proof which now rests on the jurisdiction seeking to implement the new practice or procedure." Those Senators opposed to the bill responded that that is just the result they wished to achieve by defeating an extension of Section 5 to 1975. They fully agreed that Section 5 placed the burden of proof on the covered jurisdictions, and strenuously objected to the legislative presumption (albeit rebuttable) attaching to these few States that all their election law changes were racially discriminatory. See 116 Cong. Rec. 5677-5678 (remarks of Senators Ervin, Allen and Tower).[*]

[*] See also *1969-1970 Senate Hearings*, pp. 22, 29, 53, 163, 189.

In view of these clear legislative pronouncements directly on point, we submit that the Attorney General—consistent with the statutory language, the newly promulgated regulations following congressional enactment of the 5-year extension of the Act, and the decisions of this Court in *South Carolina* and *Perkins*—properly placed the burden of proof on the State of Georgia to demonstrate that its House reapportionment plans would not have a racially discriminatory effect.[21]

IV. THE QUESTION WHETHER THE ATTORNEY GENERAL'S OBJECTION TO THE NOW REPEALED 1971 REAPPORTIONMENT PLAN WAS TIMELY IS MOOT, AND THE OBJECTION WAS TIMELY IN ANY EVENT

Appellants make one other argument in an effort to avoid the Attorney General's determination with respect to the discriminatory racial effect of the Georgia House plans. They contend that his objection to the 1971 reapportionment is of no force since it was not interposed "within sixty days after * * * submission * * *" (42 U.S.C. 1973c) of the materials received by the Department of Justice on November 5, 1971.[22] Even assuming *arguendo* that appellants can properly raise the timeliness issue in this case, their

[21] Whether its submissions in fact fell short of satisfying that burden, as the Attorney General concluded, is, we repeat, a quite separate issue that is not now before this Court. See *Perkins* v. *Matthews*, *supra*, 400 U.S. at 383–385.

[22] This submission included the enacted plans to reapportion the Congressional and State Senatorial and House districts, plus a narrative description of the boundary changes and maps showing some of the present and the proposed districts (A. 19–23, 32).

point is, at all events, of no practical significance in the circumstances presented here. Following the Attorney General's objection to the 1971 plan on March 3, 1972, the Georgia General Assembly repealed that reapportionment legislation on March 9, 1972, and, in its stead, adopted a new reapportionment plan (see Ga. Senate Bill 690, Sec. 3) which was submitted to the Department of Justice on March 15, 1972 (A. 33). It is undisputed that the Attorney General's letter of objection relating to the 1972 plan (Ga. Senate Bill 690), dated March 24, 1972, was well within the 60-day statutory period. The question whether his objection to the now repealed 1971 plan was also timely is therefore moot.

In any event, the procedures followed by the Attorney General with respect to the repealed 1971 House plan were proper. While the initial "submission" by the State was, in form, adequate to put the Attorney General on notice of a voting change (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 571), its substantive content was insufficient to permit a reasoned judgment with respect to its effect on the newly-enfranchised Negro voters in the State (A. 39). Accordingly, Assistant Attorney General Norman wrote the State Attorney General two weeks after receiving the 1971 reapportionment plans and requested 7 additional items deemed essential for a proper evaluation of the proposed changes (A. 39–41). Such a request is explicitly authorized by Section 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (36 Fed. Reg. 18189; Appellants' Br. 60). And see Sec. 51.10(a)(6), 36 Fed.

Reg. 18188 (Appellants' Br. 56). The State was, moreover, advised (A. 41): "As is provided in Section 51.18(a) of the [Regulations], the 60-day period will not commence until the above-requested information, completing your submission, is received by the Department."

We believe that this regulation is entirely consistent with what Congress intended in providing in Section 5 for a 60-day administrative review period. Just as the Act does not contemplate "that a 'submission' occurs when the Attorney General merely becomes aware of the [State or local] legislation, no matter in what manner" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 571), so, too, it does not intend that the administrative reviewing function be undertaken on the basis of a formal "submission" that is uninformative with regard to the crucial Fifteenth Amendment considerations. Since the burden of proof is on the submitting jurisdiction, the Attorney General clearly could object within 60 days to every change that he considers to be inadequately described in the papers submitted, without making any request for additional information. But such a procedure would in many cases cause just the type of undue interference with legitimate state programs that Congress sought to avoid by enactment of Section 5. See *Allen* v. *State Board of Elections, supra,* 393 U.S. at 549.

It thus best serves all the interests concerned to commence the running of the 60-day statutory period on receipt of all relevant information that bears on the decision to be made, as provided in the regulations, Sec. 51.18(a). This, of course, does not mean

that the Attorney General can delay his action indefinitely on the pretext that he needs unspecified materials. But no one has suggested that we have that situation here. The requested information in this case included population statistics by race for prior and proposed districts, additional maps showing old and new district lines in particular areas, election results for the last two elections in contests involving black candidates, and materials reflecting the legislative history of the reapportionment enactments (A. 39–41). Appellants do not dispute that the submission of these materials was necessary before the Attorney General could make an informed judgment with respect to Georgia's reapportionment proposals.

The State provided the additional information on January 6, 1972, more than 60 days after its initial submission to the Attorney General (A. 33, 42–44). Having waited that long to supplement its original filing, and then having furnished the new material with the full understanding that the 60-day period would commence to run as of that date (A. 41), the State is now in no position to complain that the Attorney General's objections, which were interposed on March 3, 1972 (A. 9–12), were untimely. See *Howell* v. *Mahon*, E.D. Va., C.A. No. 105–71N, decided May 24, 1971.[23]

[23] In *Vinik* v. *Smyth*, D. Ariz., No. Civ.–71–89 TUC–WEC, decided October 4, 1971, the district court upheld a timeliness argument similar to the one urged here by appellants. But there, the change involved related to a new statute providing for the re-registration of voters every ten years, and the court determined that the additional information requested by the Attorney General was unnecessary to make an informed evalu-

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed. Since, in accordance with the stay order of this Court entered on April 21, 1972 (see n. 5, *supra*), an election has already been held under the 1972 House plan enacted by the Georgia General Assembly, we believe that the case should be remanded to the district court to give the State an opportunity to revise its present reapportionment plan with respect to the 15 multi-member districts which remain objectionable to the Attorney General (see A. 68–70). A new election should then be held as soon as practicable to select members to the Georgia House of Representatives from the affected districts.

Respectfully submitted.

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JANUARY 1973.

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ation of the new statute's discriminatory effect. Furthermore, contrary to the present case, the court in *Vinik* placed heavy emphasis on the fact that the Attorney General's regulations, particularly 51.18(a), "were not in force and effect as of the date of this submission" (slip op. 5–6).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

STATE OF GEORGIA, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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BRIEF AMICI CURIAE FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL COUNCIL OF CHURCHES, DELTA MINISTRY, NATIONAL DEMOCRATIC PARTY OF ALABAMA, NATIONAL LEAGUE OF WOMEN VOTERS, NATIONAL URBAN LEAGUE, INC., SOUTHERN ELECTIONS FUND, VOTER EDUCATION PROJECT, INC., MISSISSIPPI STATE REPRESENTATIVE ROBERT G. CLARK, AND AARON HENRY, CHAIRMAN OF THE DEMOCRATIC PARTY OF MISSISSIPPI

INTEREST OF AMICI

This brief amici curiae is tendered on behalf of seven organizations and two individuals who are actively en-

gaged in protecting the voting rights of black persons.[1] The amici are as follows:

National Association for the Advancement of Colored People has a membership of 470,000 persons and, since its formation in 1909, has been engaged in protecting the civil rights of minorities, including the right to vote;

National Council of Churches of Christ, Delta Ministry, was established in 1964 to aid the poor and oppressed in Mississippi and since that time has worked to protect the franchise of black people in that State;

National Democratic Party of Alabama is a predominantly black political party in the State of Alabama which has in the past five years elected 67 of its candidates to public office;

National League of Women Voters is a nonpartisan voluntary association of 160,000 women which seeks to promote informed and active participation by all voters and is committed to the elimination of discrimination in voting;

National Urban League, Inc., is an interracial, nonpartisan organization working through social and political processes to better the living conditions of all minorities;

Southern Elections Fund is a nonpartisan organization which offers campaign funds and advice concerning the electoral process to candidates for legislative, county and municipal public offices in the South;

Voter Education Project, Inc., is a nonprofit, nonpartisan organization engaged, *inter alia*, in assisting the registration of minority group voters;

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[1] The United States has consented to the filing of this brief, and the State of Georgia has stated that it has no objection to the filing of this brief. These consents have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

Mississippi State Representative Robert G. Clark is the first and only black person in modern times to hold a seat in the Mississippi Legislature; and

Aaron Henry is Chairman of the Democratic Party of the State of Mississippi and has been directly engaged for years in efforts to eliminate discriminatory barriers to the registration and voting of black persons.

These amici have joined in this brief to urge affirmance of the decision below.

STATEMENT OF FACTS

The material facts are not in dispute. In 1971, following the decennial census of 1970, the Georgia Legislature determined to reapportion its State House of Representatives,[2] which had last been apportioned, under court decree,[3] in 1968.

The 1968 plan had provided for 118 House districts, of which 47 were multi-member districts electing from two to seven representatives per district.[4] The 1968 House districts had followed county lines, though certain districts encompassed more than one county and certain counties included more than one district (A. 37). Pursuant to statutes enacted prior to November 1, 1964, candidates in multi-member districts had to designate the seat for which they would run—the so-called "num-

[2] The State Senate and federal congressional districts were also reapportioned by the Legislature at the same time. These changes were ultimately approved by the United States Attorney General and are not at issue in this case. (A. 73).

[3] See *Toombs* v. *Fortson*, 277 F. Supp. 821 (N.D. Ga. 1967).

[4] The 1968 plan superseded a 1964 court-decreed plan which contained 159 districts of which 38 were multi-member districts. Thirty of the 1964 multi-member districts had two members and eight had three members.

bered post" requirement. 47 Ga. Code Ann. § 119. If no candidate received a majority of the votes cast for a position, a majority runoff was required. 1962 Ga. Laws 1217, 1218; 1964 Ga. Laws, Ex. Sess. 174-75.

On October 14, 1971, the Georgia Legislature enacted a new plan reapportioning the districts for the State House of Representatives. This plan decreased the number of districts from 118 to 105. Forty-nine districts were multi-member districts, electing from two to six representatives.[5] Under the October 1971 plan, districts no longer followed county lines as they had in the 1968 plan. Thirty-one of the 49 multi-member districts and 21 of the 56 single-member districts irregularly crossed county boundaries. The counties were unevenly divided, and small, odd-shaped portions of one county were included within districts comprised mainly of territory within an adjacent county. The boundaries of all but one of the 105 districts were changed from the 1968 plan and the number of representatives altered in many. (A. 38). Moreover, as a result of the October 1971 reapportionment, the residents of 31 counties became subject to the numbered post requirement because within these counties there were changes from single-member to multi-member districts.[6]

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[5] Twenty-nine districts elected two representatives, 16 elected three representatives, three elected four representatives, and one elected six representatives. Of the 56 single-member districts, 31 were overlaid with floating representatives, so that the districts were actually represented by one and a fraction representatives. (A. 38).

[6] It appears from the record that all the residents in 30 of the counties were so affected while in one county only some of the residents were transferred from a single-member to multi-member district. (A. 38). The counties affected were: Appling, Bacon, Barrow, Barton, Brantley, Candler, Charlton, Coffee, Decatur, Emanuel, Evans, Fannin, Floyd, Gilmer, Grady, Houston, Jeff Davis, Jefferson, Lee, Lincoln, Lumpkin, Madison, Oconee, Ogl-

Following its enactment, the revised Georgia House redistricting plan was forwarded for review to the United States Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The Attorney General received the plan on November 5, 1971. On November 19, 1971, David L. Norman, Assistant Attorney General, requested that Georgia furnish the Attorney General with certain additional information relating to the proposed reapportionment necessary to complete the submission of the plan to the Attorney General and "to evaluate properly the changes . . . submitted." (A. 39).[7] The letter noted, in accordance with regulations promulgated by the Attorney General, 28 C.F.R. § 51.18(a), that the 60-day period within which the Attorney General was required to make his objection to the state plan would commence when the additional information was received (A. 41).[8] This additional information was received by the Attorney General on January 6, 1972. (A. 9).

On March 3, 1972, the Attorney General objected to the October 14, 1971, plan for the Georgia House of Representatives. In a letter on behalf of the Attorney General, Mr. Norman said (A. 10):

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thorpe, Pierce, Taliaferro, Towns, Union, Wayne, White and Wilkes. (A. 38).

[7] Specifically requested were census maps showing the 1964 and 1968 House districts, the distribution of white and non-white population within the 1964, 1968 and 1971 districts, a history of the primary and general elections in which black candidates ran, data on all elected state representatives, and the legislative history of all redistricting bills. (A. 39-41).

[8] 28 C.F.R. § 51.18(a): "If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission."

> "With respect to the reapportionment plan for the House of Representatives, a careful analysis and review of the demographic facts and recent court decisions identify several significant issues. Forty-nine of the 105 districts in the plan are multi-member and we note that it contains a requirement that candidates in those districts must run for numbered posts. We also note that existing Georgia law requires a run off in the event no candidate receives a majority of votes in either a primary or a general election. We note further that of the 105 districts 52 are made up of portions of a county, including 31 of the multi-member districts. These facts suggest that the state's traditional policy of maintaining county lines in designing legislative districts has been significantly modified.

The letter further stated that because of the plan's "combination of multi-member districts, numbered posts, and a majority (runoff) requirement" together with "extensive splitting and regrouping of counties" (*id.*), the Attorney General was "unable to conclude that the plan does not have a discriminatory racial effect on voting" (A. 10-11). That determination was reinforced by "demographic facts" relating to east central Georgia where seven formerly single-member districts with potential black majorities under the 1968 plan had been so combined under the October 1971 plan as to allow for only four majority black districts (A. 12). The letter continued that these "facts, in the context of a plan that frequently cuts across county lines, do not permit us to conclude, as we must under the Voting Rights Act, that this plan does not have a discriminatory racial effect on voting" (A. 12). Accordingly, the letter concluded, "I must on behalf of the Attorney General interpose an objection to changes submitted by the reapportionment plans . . . ." (A. 12).

Six days later, on March 9, 1972, the Georgia General Assembly, in response to the objection of the Attorney General, enacted a new reapportionment plan for the Georgia House (A. 33). The March 1972 plan provided for 128 districts of which 32 were multi-member districts. Twenty-two of the multi-member districts and 37 of the single-member districts still crossed county boundaries. The March 1972 plan differed from the October 1971 plan in that 14 of the "October" districts had been altered in the March 1972 plan by division into two or more districts or by other variation of the prior boundary lines. In the main these redistricting changes pertained to the east central Georgia counties that had black majority populations. Left unchanged were 13 multi-member districts in which the non-white population was so demographically concentrated that, in the Attorney General's opinion, the combination of multi-member districts, numbered posts, and majority runoff requirements, offered a significant likelihood of diluting or abridging the voting rights of these non-white persons. (A. 68).*

On March 24, 1972, the Attorney General objected to the March 9, 1972, plan for the Georgia House of Representatives which had been submitted to him on March 15, 1972. (A. 6, 13). In pertinent part, the Attorney General said (A. 13):

> "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972 letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for

* There were 15 districts so demographically concentrated in the March 1972 plan. Thirteen of the 15 had the same boundaries as they did in the October 1971 plan. (A. 45, 68).

the reasons enunciated in my March 3, 1972 letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives."

The Georgia Legislature had indicated by a resolution adopted when it passed the March 9, 1972, plan that it would take no further steps to enact another plan if the Attorney General continued to maintain his objections.[10] Thus, after his objection to the March 1972 plan, the Attorney General, on March 27, 1972, filed suit in the District Court for the Northern District of Georgia to enjoin the conducting of elections under either the October 14, 1971, or the March 9, 1972, plan inasmuch as these plans encompassed "standard[s], practice[s], [and] procedure[s]," different from those in effect on November 1, 1964, and which had not been approved either by the Attorney General or the District Court for the District of Columbia. See 42 U.S.C. § 1973c. A three-judge court was convened, and, after receiving oral and written submissions,[11] the court "enjoin[ed] the State of Georgia from proceeding to hold elections under the present reapportionment plan" (A. 75) because the plan had not been approved as required by Section 5 of the Voting Rights Act of 1965. Specifically, the court held that Section 5 was applicable to the new Georgia House reapportionment plan (A. 73-74):

"In view of *Allen* v. *State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969), and *Perkins* v. *Matthews*, 400 U.S. 379, 27 L.Ed.2d 476,

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[10] In pertinent part the resolution provided "that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority votes" (A. 18).

[11] In an "Interim Report" filed with the district court on April 18, 1972, the Attorney General made specific objection to 15 multi-member districts and withdrew objection as to the remaining multi-member districts (A. 67-71).

91 S.Ct. 431 (1971), this Court holds that Section 5 is applicable to such plans. Moreover, this reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, replaces single-member districts with multi-member districts. The State's contention to the contrary is not well-founded.

The court further held "that Section 5 of the Voting Rights Act is constitutional as applied." (A. 75). Finally, in response to Georgia's contention that the Attorney General's objection to the plan was not timely, the court said (A. 74):

> "In looking at the timetable of events in this case, we find that the Attorney General objected to the State's plan within the requisite 60 days. The first House reapportionment plan was submitted to the Attorney General on November 5, 1971. By letter dated November 19, 1971, the Attorney General requested further information from the State to aid in his Section 5 review. At that time, the Attorney General advised the State that the 60-day period for objection would commence running when the additional information was received by the Justice Department. That additional information was received on January 6, 1972 (more than 60 days after the State first submitted its plan), and the United States made its objection to the plan on March 3, 1972. Since the Attorney General's objection of March 3, 1972, was made within 60 days of his receipt of the additional information, we find that there was compliance with the 60-day time limit by the Attorney General. Likewise, the Attorney General's March 24, 1972 objection to the second House reapportionment plan dated March 9, 1972 was within the 60-day period. The Court will not allow the State to withhold additional information sought by the Attorney General until after the 60-day period has

elapsed and thereafter contend that the Attorney General failed to object within the statutory period."

Prior to the issuance of its written opinion, the district court had announced orally its decision to enjoin the enforcement of the Georgia House districting plan (A. 58) and had considered the question of an appropriate remedy at the same oral hearing. The Court had indicated that "it would be wise [for Georgia] to work with the Justice Department" on this matter (A. 63). The Speaker of the Georgia Assembly agreed to hold a special session to enact a new House apportionment plan devised in conjunction with "representatives from the Justice Department [who would] come down and work with us on this." (A. 65). Elections were to be held under the proposed new plan.

On April 21, 1972, this Court stayed the enforcement of the district court's order. *Georgia* v. *United States*, No. A-1106 (Apr. 21, 1972). Consequently, both primary and general elections took place under the March 9, 1972, reapportionment plan.

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, suspends the operation of "any" change in a "standard, practice or procedure with respect to voting" in covered States and political subdivisions until the Attorney General of the United States acquiesces in the implementation of the change or the District Court for the District of Columbia declares that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." This provision is a linch-pin in the system designed by Congress to eliminate racial discrimination in voting. One hundred years of history had shown that no set proscription of discrimination by Congress or the courts would be effective against the

ingenuity of certain States which had consistently developed new means to deny or abridge the vote once old ones had been struck down. So Congress froze the voting laws and procedures in these States as they had been in November 1964 and required that any change be scrutinized for discriminatory purpose or effect before becoming operational. This Court has three times fully considered Section 5 in major cases, upholding its constitutionality, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and construing it to cover shifts from district to at-large elections, *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), and redrawing of boundaries, *Perkins* v. *Matthews*, 400 U.S. 379 (1971).

The major issues presented here are whether the preclearance requirements of Section 5 are applicable to reapportionment laws of state legislatures and are constitutional as so applied. Minor issues are whether, in determining to object to the proposed changes in the Georgia voting laws, the Attorney General properly placed the burden of proof on the submitting jurisdiction and whether he interposed his objection in timely fashion. We believe that the Attorney General properly applied Section 5 to reach reapportionment plans; that to do so was constitutional; that he correctly placed the burden of proof of non-discrimination on the applicant; that he acted timely in interposing his objection; and that the principles enunciated by this Court in *South Carolina* v. *Katzenbach*, *Allen* and *Perkins* establish the correctness of his actions.

1. *Allen* v. *State Board of Elections*, 393 U.S. 544, 565-66, 569 (1969), holds that changes in election laws which have the potential for diluting the voting strength of black voters must be cleared pursuant to Section 5. Reapportionment is such a change. History, decided court cases and rulings of the Attorney General pursuant to Section 5 demonstrate beyond question that such laws

have a significant potential for diluting the voting strength of black voters. Moreover, the inclusion of reapportionment laws within the compass of Section 5 was intended by the Congress. In 1970 Congress determined to extend the Voting Rights Act of 1965 for five additional years. Congress made that determination with knowledge that covered States would be reapportioning in the wake of the 1970 decennial census, that this Court had recognized that the Act was to be given "the broadest possible scope" (*id.* at 567), and that Section 5 had been applied to redistricting actions. Congress made no exception for reapportionment laws.

2. Section 5, as applied to the reapportionment laws of covered States, is "appropriate legislation" authorized by Section 2 of the Fifteenth Amendment. The enabling clause of the Amendment, as this Court held in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), permits Congress to use "any rational means to effectuate the constitutional prohibition of racial discrimination in voting." Moreover, in *South Carolina* v. *Katzenbach*, this Court held that preclearance of changes in standards, practices or procedures respecting voting in covered States was a rational means for effectuating the Fifteenth Amendment. Reapportionment is merely a name for a collection of changes in voting laws, particularly changes in the boundaries of election districts and changes in the allocation of representatives among districts. Like any other change in voting laws, reapportionment may be used to dilute the voting power of minority groups. It was, therefore, rational and permissible for Congress to subject such plans to preclearance procedures in order to assure that the rights of minority group voters are not abridged.

3. The Attorney General objected to the Georgia reapportionment plan because Georgia failed to demonstrate that the plan did not have a discriminatory purpose or

effect. Appellants argue that the Attorney General improperly placed the burden of proof on Georgia. In the court below, however, the State conceded that "the Justice Department is not required to prove discrimination" (A. 54). That concession should remove the issue from consideration. In any event, the argument is without merit since the uncontradicted legislative history of the Act demonstrates that the intention of Congress was to "plac[e] the burden of proof on a covered jurisdiction." H.R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969).

4. The Attorney General's objection to the Georgia plan was timely. The plan enjoined by the court below was presented to the Attorney General on March 15, 1972. He announced his objection on March 24, 1972, which is well within the 60-day period for objection set forth in Section 5. Georgia argues that a prior objection of the Attorney General to an earlier and different reapportionment plan was untimely. We do not believe that the argument is properly in this case. Moreover, it is defective on the merits since the Attorney General ruled within 60 days of receiving a complete submission of the proposed change. From the outset Georgia was advised by the Attorney General and by Department of Justice regulations governing submissions pursuant to Section 5 that the 60-day period would commence effective upon receipt of the information deemed essential to evaluate whether the proposed change would have the purpose or effect of abridging the right to vote on account of race. Georgia chose to make its submission in piecemeal fashion, and the Attorney General objected within 60 days after receiving the complete submission. The Attorney General's regulations providing that a change is submitted only when the information necessary to evaluate it is received should be given authoritative effect by the Court, and, in any event, his reasonable and necessary construction of Section 5 should be adopted.

ARGUMENT

I

ALL CHANGES IN ELECTION LAWS HAVING THE POTENTIAL OF DILUTING THE VOTING STRENGTH OF BLACK VOTERS, INCLUDING CHANGES MADE INCIDENT TO REAPPORTIONMENT, ARE SUBJECT TO THE PRECLEARANCE PROCEDURES OF SECTION 5 OF THE VOTING RIGHTS ACT

A. Introduction.

The Georgia 1972 reapportionment act changed the boundaries of virtually every election district from what they had been in 1968. The law for the first time placed some voters in the State in "multi-member districts" and exposed them to the politics and mechanics of voting for numbered posts. In addition, other voters were shifted from multi-member to single-member districts.[12] The

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[12] These facts answer Georgia's assertion (Ga. Br. 25-30) that the 1972 reapportionment plan did not in actuality constitute a change in the State's voting laws. They also support the district court's finding that there was in fact a change (A. 73-74):

> "[T]his reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, replaces single-member districts with multi-member districts. The State's contention to the contrary is not well-founded."

Georgia may be suggesting that as a matter of law the 1972 plan was not, in the words of Section 5, a "standard, practice or procedure with respect to voting *different* from that [previously] in force or effect" because the State's prior plan had included boundary lines, single and multi-member districts, and requirements for numbered posts and majority runoffs—albeit in different configurations. The legislative history of Section 5 bars any claim that a covered jurisdiction may apply old practices in a new manner without preclearance. See, *e.g.*, the testimony of Attorney General Katzenbach in 1965 that a change from paper balloting to machine balloting would be covered by Section 5 and the testimony of Assistant Attorney General Norman in 1970 that a reduction in filing fees for candidates is covered by Section 5. Hearings

question before the Court is whether such reapportionment changes are covered by Section 5 of the Voting Rights Act of 1965.

By its terms Section 5 requires covered States such as Georgia to submit to the Attorney General or to the District Court for the District of Columbia "any . . . standard, practice or procedure with respect to voting" which is "different from that in force or effect" on November 1, 1964 or November 1, 1968. 42 U.S.C. § 1973c (1970 ed.). The language of Section 5 is categorical. It reaches "any" standard, practice or procedure respecting voting. Beyond that, voting is defined in Section 14(c) of the Act in broad terms. Voting encompasses "all action necessary to make a vote effective . . . including, but not limited to, registration, . . . listing . . . , casting a ballot and having such ballot counted properly and included in the appropriate totals of votes cast . . . ." 42 U.S.C. § 1973*l*.

Moreover, this Court has said that these words are to be given the broadest possible meaning. In *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969),[12] this Court scrutinized the text of Section 5, studied its legislative history and explained its scope. The Court observed that "the legislative history on the whole supports the view that Congress intended to reach *any* state enactment which altered the election law of a covered State in *even a minor way*." *Id.* at 566 (emphasis added). Thus, the

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on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 62 (1965); Hearings on Amendments to the Voting Rights Act of 1965, before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2 Sess., p. 511 (1970). See also *Perkins* v. *Matthews*, 400 U.S. 379 (1971) (a change in the boundary of an election district is within Section 5).

[12] *Allen* was decided together with No. 25, *Fairley et al.* v. *Patterson*, No. 26, *Bunton et al.* v. *Patterson*, and No. 86, *Whitely et al.* v. *Williams*.

Court noted that even though the initial draft of the Act covered voting "qualifications and procedures" and the Attorney General had testified that the word "procedures" "was intended to be all inclusive of any kind of practice," Congress cast the final Act in terms even more encompassing—namely, "qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Congress, said the Court, held "an intention to give the Act the broadest possible scope." *Allen*, *supra*, at 566-67.[14] In addition, the Court reviewed the testimony before the Senate and House committees and the debates over the passage of the Act. This commentary indicated that there were "'precious few,'" perhaps "two or three types of changes in state election law (such as changing from paper ballots to voting machines) which could be specifically excluded from § 5 without undermining the purpose of the section." Nevertheless, as the Court found, "Congress chose not to exclude even these minor exceptions in § 5, thus indicating an intention that all changes no matter how small, be subjected to § 5 scrutiny." *Id.* at 567-68.

Allen's bearing on the case at bar, however, is not restricted to the Court's explanation of the general contours of Section 5. As we show below, *Allen* holds that Section 5 covers changes in standards, practices and procedures which have the potential for diluting the voting strength of black voters, as well as those which would deny the franchise absolutely to black voters. *Id.* at 565-66, 569. Reapportionment laws, we submit, fall naturally within the coverage of the Act, as determined by *Allen*, because such laws have the potential for diluting the voting strength of black voters. Moreover, Congress intended

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[14] See *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971), where the Court said, "We held in *Allen* that Congress intended that the Act be given 'the broadest possible scope' to reach 'any state enactment which altered the election law of a covered State in even a minor way.'"

such laws to be governed by Section 5. In 1970, Congress was advised that reapportionment laws enacted pursuant to the 1970 census would come within the coverage of Section 5 as construed by this Court in *Allen*. After a careful reexamination of the Act, Congress extended Section 5 for five years in substantially verbatim terms, thereby adopting this Court's construction of the Act.

B. Section 5 Covers Changes in Election Laws That May Dilute the Voting Strength of Black Voters.

1. Allen *Holds That Section 5 Covers Changes That May Dilute the Voting Strength of Black Voters.*

In amici's view, *Allen* reveals the doctrinal basis for concluding that reapportionment laws come within the coverage of Section 5. *Allen* makes clear that one of the evils or mischiefs which Congress sought to protect against was dilution of black voting strength in covered States. The *Allen* Court's holding on this point is found in the portion of the Court's opinion dealing with No. 25, *Fairley* v. *Patterson*.

At issue in *Fairley* was a 1966 amendment to the Mississippi law pertaining to the election of the board of county supervisors in each county in the State. Prior to the amendment, each county was divided into five "beats" —districts—and the electors in each district elected one of the five members of the county board of supervisors. By virtue of the 1966 amendment the county boards of supervisors were authorized to adopt orders providing that the board members would be elected at large by all qualified voters in the county rather than on a district-by-district basis. *Fairley, supra*, 393 U.S. at 550.[18]

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[18] The ostensible purpose for enacting these amendments was to meet the one-man one-vote requirement of the Fourteenth Amendment. See the testimony of Mississippi Attorney General Summer, quoted at note 23, *infra*.

Fairley presented an instance where the new legislation did not enact any rule or standard that might be used to deny, in absolute terms, the right of a Negro to cast a ballot. Rather the new legislation, at worst, could only dilute the voting strength of black voters. Thus, the issue before the Court was whether the Voting Rights Act protected against the dilution of black voting strength as well as against the absolute denial of the right to vote.

Mr. Justice Harlan, in dissent, took a restrictive view of "voting" as that term is used in the statute. He believed that Section 5 applied only to a change in "either voter qualifications or the manner in which elections are conducted." *Id.* at 591. He rejected the idea that "a state covered by the Act must submit for federal approval all those laws that could arguably have an impact on Negro voting power, even though the manner in which the election is conducted remains unchanged." *Id.* at 588. In his view, "Congress did not in any way adopt the reapportionment cases' expansive concept of voting when it enacted the Voting Rights Act of 1965." *Id.* at 589.

The majority in *Fairley* held that the change from district to at-large elections came within the coverage of Section 5 because "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)." [16] The Court pointed out that in Mississippi black voters "might well be in the majority in one district, but in a decided minority in the county as a whole." The change in law "could therefore nullify their ability to elect the candidate of their choice just as

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[16] *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 569. Seven Justices joined in the opinion of the Court, and Mr. Justice Black, who dissented on grounds that Section 5 is unconstitutional, observed that "Assuming the validity of the Voting Rights Act of 1965, as the Court does, I would agree with its careful interpretation of the Act, . . . and with its disposition of the four cases now before us." *Id.* at 595.

would prohibiting some of them from voting." *Allen* v. *State Board of Elections, supra*, 393 U.S. at 569.

In this connection, the Court noted that "The Voting Rights Act was aimed at the subtle, as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their race." The Court focused specifically on the definition of "voting" in Section 14(c) of the Act: this definition "gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make the vote effective.'" *Id.* at 565-66, quoting 42 U.S.C. § 1973*l*(c). Furthermore, the Court said in *Allen*, the broad meaning of voting is "compatible with the decisions of this Court," particularly *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964), which protects against dilution.[17]

Thus, *Allen* makes clear that Section 5 of the Voting Rights Act protects against dilution as well as total denial of the franchise, and that "standards, practices and procedures" which may arguably be used to dilute the voting strength of Negro voters are "standards, practices and procedures with respect to voting" which must be submitted for preclearance according to the terms of Section 5 of the Act.[18]

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[17] At page 555 of the *Reynolds* decision, which the Court specifically refers to in *Allen*, the *Reynolds* Court concluded that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

[18] See also *Perkins* v. *Matthews*, 400 U.S. 379, 390, where the Court reviewed its opinion in *Allen* and observed:

> "In *Fairley* v. *Patterson*, 393 U.S. 544 (1969), a companion case to *Allen*, this Court held that § 5 applied to a change from district to at-large election of county supervisors on the ground that
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> '[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a

2. *Congress Extended Section 5 of the Voting Rights Act for Five Years with the Understanding That It Covered Changes in Election Laws That May Dilute the Voting Strength of Black Voters.*

As originally enacted, Section 5 was scheduled to expire on August 6, 1970. Congress, however, in the Voting Rights Amendments of 1970, extended the provisions of Section 5 for five more years without making any substantive modification of that section.[19] The deliberations of the Congress, moreover, demonstrate that the decision to extend Section 5 was fully considered and not merely a *pro forma* matter.[20]

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ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).' 393 U.S., at 569

Mr. Justice Harlan's separate opinion in that case accurately recognized that the Court's holding rested on its conclusion that 'Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims*, 377 U.S. 533, (1964), and protect Negroes against a dilution of their voting power.' *Fairley* v. *Patterson*, *supra*, at 588."

[19] See P.L. 91-285, 84 Stat. 314, 315 (1970).

[20] House and Senate subcommittees held hearings on various bills which would extend the Voting Rights Act, as well as a proposal by the President which would have permitted the preclearance procedures of Section 5 to expire. H.R. 12695, 91st Cong., 2d Sess. (1970); S. 2507, 91st Cong., 2d Sess. (1970). See Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. (1970); Hearings on H.R. 4249, H.R. 5538, and Similar Proposals, before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., ser. no. 3 (1969). House Subcommittee No. 5 of the Judiciary Committee reported favorably to the House on H.R. 4249, which would extend the Voting Rights Act, including Section 5, for five additional years. House Rep. No. 91-397 To Accompany H.R. 4249, 91st Cong., 1st Sess. (July 23, 1969). The Senate Committee on the Judiciary reported H.R. 4249 "without recommendation," and ten members of the Senate Judiciary Committee prepared a statement of their joint views. 116 Cong. Rec. S 2754 (daily ed. March 2, 1970). The House debated for two days and ultimately adopted the bill pro-

Throughout the extensive hearings and debates on the question of extending the bill, this Court's decision in *Allen* was referred to again and again by opponents and proponents of the Voting Rights Amendments of 1970.[21] The decision was published in the House Hearings.[22] The Report of the House Judiciary Subcommittee No. 5 states that "[I]n *Allen* v. *Board of Elections*, 393 U.S. 544 (1969), the Court determined the scope and application of provisions requiring Federal review of new State voting enactments (sec. 5):". H. R. Rep. 397, 91st Cong., 2d Sess. 4 (1970).

The legislators were continually made aware that Section 5 covered changes in standards that could dilute or abridge the power of Negro voters as well as changes in standards that would totally deny the franchise.[23] Thus,

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posed by the Administration. 115 Cong. Rec. H 12184 (daily ed., December 11, 1969). The Senate intermittently debated the question of extending the Voting Rights Act on March 2-5 and 9-13, 1970, and voted to extend the Act on the latter date. 116 Cong. Rec. S 3174 (daily ed. March 13, 1970). Finally, the House, after further debate, acceded to the Senate's bill. 116 Cong. Rec. H 5679 (June 17, 1970).

[21] See, *e.g.*, Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 91st Cong. 1st and 2d Sess. at 48, 52, 168-69, 196, 369-70, 393, 426-27, 469, 505, 522 (1970); Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., ser. 3 (1969) at 1, 4, 18, 33, 130-31, 147, 148, 149, 155, 172, 182-83, 267, 271, 313. See particularly the Senate debates, 116 Cong. Rec. at S 2775, 2788 (daily ed. March 2, 1970), S 3185, 3192-94 (daily ed. March 6, 1970), S 3901 (daily ed. March 12, 1970).

[22] Hearings on Voting Rights Act Extension before Subcommittee No. 5, House Judiciary Committee, 91st Cong., 1st Sess. 402 (1969).

[23] Attorney General Summer of Mississippi appeared before Subcommittee No. 5 of the House Committee on the Judiciary to oppose an extension of Section 5. He relied heavily upon Mr. Justice Harlan's dissent in *Allen*, and explained that the Court in *Allen* "held that 'voting' as used in Section 5 meant 'all actions necessary to make a vote effective' and that any dilution of voting power was prohibited as fully as a complete denial of the right

in discussing the need for extending the Voting Rights Act of 1965, the House Report points out that while the Act had increased Negro voter registration "several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat the Negro and Negro-supported candidates." *Id.* at 7. The House Report also observes that "The U. S. Commission on Civil Rights has reported that these measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts and facilitating the consolidation of predominantly Negro and predominantly white counties." So too, "Several Federal court decisions offer further documentation of the efforts made to dilute the recent gains in Negro voting strength." *Id.*, citing, *inter alia*, *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala. 1966).[24] Finally, the re-

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to vote at all." Hearings on Voting Rights Act Extension, before Subcommittee No. 5, House Judiciary Committee, 91st Cong., 1st Sess., ser. 3 (1969), at 130. He also pointed out that the Mississippi law which was stayed in *Fairley* "provided counties with the option of redistricting or going to a county-at-large basis for electing supervisors. This last act was passed by our legislature to comply with the one-man, one-vote rule of *Baker* v. *Carr*, 369 U.S. 186 and *Reynolds* v. *Sims*, 377 U.S. 533." *Id.* Attorney General Summer gave the same testimony in Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. 369-70 (1970).

[24] "The Joint Views of Ten Members of the [Senate] Judiciary Committee" quoted the following testimony of Mr. Howard A. Glickstein, Staff Director of the United States Commission on Civil Rights:

> "In 109 wards [in Louisiana], Negroes were in the majority, according to the 1960 Census, while Negroes only constituted the majority of voters in five parishes. Thus, a change from ward to at large voting [as proposed in 1968 with respect to police juries] would have the effect of diluting the actual or potential voting power of Negro inhabitants. The Attorney General, in objecting to the change in September 1969, re-

port again takes "note" of the *Allen* decision in which "[t]he Court discussed the history of enforcement of Section 5 and clarified its scope." *Id.* at 8.

The short of the matter is that Congress reenacted Section 5 with the full knowledge and understanding that the Act covered not only those standards, practices and procedures that could deny absolutely the right to vote, but also, as this Court held in *Allen*, those that could be used to dilute or abridge the voting strength of Negro voters. *Allen*, therefore, stands not only as this Court's definitive statement of the mischiefs that Section 5 of the Voting Rights Act of 1965 guarded against, but also as the interpretation that Congress adopted when it passed the Voting Rights Amendments of 1970. *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.' "). *Accord*, *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924); *cf. Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237 (1873) ("when a judicial construction has been given to a statute, the reenactment of

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ferred to the decision of the Supreme Court in *Allen*, in which the Court stated:

> 'The right to vote can be affected by dilution of voting power as well as by an absolute prohibition on casting a ballot.' [citing "Letter of September 10, 1969 from Jerris Leonard, Assistant Attorney General, Civil Rights, to Jack P. Gremillion, Attorney General of Louisiana, quoting the Supreme Court at 393 U.S. 569."]' "

116 Cong. Rec. S 2758, 2760 (daily ed. March 2, 1970). See also Appendix B to the "Joint Views" where the Civil Rights Commission Staff advised that "until the *Allen* decision . . . it had been unclear whether Section 5 applied to all election law changes in covered states, or only to those changes which dealt with voting and registration . . . . Because the Court has now made clear that Section 5 has a very wide scope, States can now be expected to submit more statutes for approval." *Id.* at S 2764. See also *Id.* at S 3193, 3194 (daily ed. March 6, 1970).

the statute is generally held to be in effect a legislative adoption of that construction"); *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-5 (1954).

C. Revisions of Voting Districts and Switches to At-Large Elections Can Dilute the Voting Power of Negroes.

We demonstrated above that the Voting Rights Act covers any change in election laws that may have the effect of diluting the voting strength of black voters. We turn now to the question whether redistricting and switching from single- to multi-member districts—actions embodied in the 1972 Georgia reapportionment plan—have a potential for diluting the voting strength of black voters. If so, the court below properly held that the plan fell within the preclearance provisions of Section 5.[22]

The Georgia legislation at bar draws new voting districts for the election of representatives to the Georgia House of Representatives. In some of the newly drawn districts only a single representative is elected to the House. In other districts ("multi-member districts") from two to six legislators are elected at-large from the district. A candidate for office in the multi-member districts may seek only one of the several available seats in the district and must designate in advance, by number, the particular seat for which the candidate is vying. The legislation at bar thus redefines the geographical limits

[22] The issue for determination here is not whether Georgia's election laws in fact violate the Fifteenth Amendment. That question, the merits, was reserved by Section 5 for determination by the District Court for the District of Columbia or the Attorney General and is not properly before the Court. *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971). Rather the sole question to be addressed is whether standards, practices and procedures of the nature embodied in the Georgia plan can be drawn in a manner that would dilute the voting strength of black voters.

of the voting district where the voter will cast his ballot. It changes the racial and political composition of the other voters in a given voter's district. And if the voter is in a newly created multi-member district, it exposes him to "at-large" elections and the mechanics and politics of voting for numbered posts.

There can be no question that the process of drawing new lines and creating multi-member districts with at-large election procedures can be used to dilute the voting strength of black voters.[26] Redistricting requires that voters be divided into groups. If in redistricting the distribution of voters by race is known and considered, the voting strength of minority groups within the population can be significantly diluted. *Whitcomb* v. *Chavis*, 403 U.S. 124, 176-77 (1971) (Douglas, J., dissenting) ("Lines may be drawn so as to make the voice of one racial group weak or strong as the case may be."). For example, in the course of redistricting white voters can be added to formerly black majority districts to decrease the black voting strength within the newly formed district. Alternatively, a former black majority district can be divided among many surrounding districts to eliminate the black voting strength within the old district. Moreover, when a state legislature is authorized to form multi-member districts, redistricting becomes an even more formidable device for diluting black voting strength for entire single-member districts may be lumped together to create a majority white multi-member district.[27]

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[26] For years legislators wilfully used such devices to dilute the strength of voters considered favorable to an opposing party. *Sims* v. *Baggett*, 247 F. Supp. 96, 104 (M.D. Ala. 1965) ("The practice of gerrymandering for the purpose of preventing members of a political party from being elected is a familiar one."); see also *Whitcomb* v. *Chavis*, 403 U.S. 124, 176, 180 (1971) (Douglas, J., dissenting); *Wells* v. *Rockefeller*, 394 U.S. 547, 555 (1969) (White, J., dissenting).

[27] See *Graves* v. *Barnes*, 405 U.S. 1201, 1202 (1972); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143-144 (1971); *Burns* v. *Richardson*, 384

Even in the relatively few cases in which this Court has construed Section 5 of the Voting Rights Act of 1965, it has held that changing lines through annexation and substituting at-large elections for single-seat elections —practices which are indistinguishable in principle from those employed by the Georiga Legislature—have the potential for diluting the voting strength of minority groups. In *Fairley* v. *Patterson*, *supra*, the Court held that a change from single-member voting districts within a county to at-large elections within the county constitutes the type of change that could nullify the black voters' ability to elect the candidate of their choice. The Court recognized that "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." 393 U.S. at 569.

In *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the concern was whether the annexation of new territory by a city—redrawing of the boundary line—was a change requiring submission and approval before it could be implemented. The Court held "§ 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation." *Id.* at 388-389. In this connection, the Court observed:

> "Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election

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U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 487, 439 (1965); *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972); *Bussie* v. *Governor of Louisiana*, *supra*; see also *Perkins* v. *Matthews*, *supra*, (change from ward to at-large election of alderman); *Allen* v. *State Board of Elections*, *supra* (change from district to at-large election of county supervisors); *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala.), *aff'd*, 386 F.2d 979 (5th Cir. 1966) (change from "beat" to at-large election of committeemen).

and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), provides a clearcut illustration of the potential of boundary changes for 'denying or abridging the right to vote on account of race or color.' In addition, based on the findings of an 18-month study of the operation of the Voting Rights Act by the United States Civil Rights Commission, the Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:

> 'The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Acts and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
>
> "For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly franchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.' Hearings on Voting Rights Act Extension be-

fore Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 8, p. 17 (1969) (remarks of Mr. Glickstein)."

To summarize, there can be no question that a legislature may draw lines and establish new multi-member districts in such a way as to dilute the voting strength of black voters." Such legislation, therefore, comes within the coverage of Section 5 of the Voting Rights Act of 1965, as amended.

D. Section 5, as Amended, Does not Exempt Changes in Elections Laws That are Made Incident to Reapportionment.

1. Georgia Has Not Demonstrated a Basis for Exempting Reapportionment Laws from Section 5.

In the case at bar, the election law was enacted for the avowed purpose of reapportioning the Georgia Legislature. Georgia argues that such laws are not subject to the preclearance procedures of Section 5 because "Reapportionment simply is not a 'voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting' within the meaning of Section 5" (Ga. Br. 22).

" Reapportionment plans not only can be used to dilute black voting strength, but in fact have been so used. In Appendix A amici have reprinted four letters of the Attorney General in which he has objected to reapportionment plans submitted under Section 5. See also *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex.), *stay denied*, 405 U.S. 1201 (1972) (Powell, J.) (multi-member districts); *Sims* v. *Amos*, *supra* (multi-member districts); *Dunston* v. *Scott*, 336 F. Supp. 206 (E.D. N.C. 1972) (multi-member districts used in conjunction with a numbered seat law and a law prohibiting voters from concentrating their votes on a single candidate ("anti-single shot" law)); *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971) (redistricting to dilute black vote); *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala.), *aff'd*, 386 F.2d 979 (5th Cir. 1966) (change from "beat" to at-large election of committeemen).

As we understand Georgia's position, the State does not ask that *Allen* and *Perkins* be reconsidered and overruled. Rather, Georgia's position is that *Allen* and *Perkins* did not hold that "reapportionment" laws were subject to Section 5, and thus it remains open for the Court to hold that the changes made by the Georgia Legislature —while identical in nature and potential discriminatory effect to the changes in *Allen* and *Perkins*—are exempt from Section 5 because Georgia's changes were made in the name of reapportionment.

Georgia's proposed exemption would eviscerate Section 5 of the Voting Rights Act. *Allen* and *Perkins* hold that drawing new lines and changing to elections at large require preclearance under Section 5 because such changes may dilute the voting strength of Negro voters. But under Georgia's argument these changes would not be subject to preclearance procedures if they were embodied in legislation that ostensibly is enacted for reapportionment.* Such an exemption for reapportionment would provide an escape hatch for every State that is now covered by the Act. It would be readily available to every covered State, moreover, because the 1970 decennial census made reapportionment appropriate at the same time as the Voting Rights Amendments of 1970 took effect.

Inasmuch as an exemption for reapportionment legislation would leave such a hole in the reach of the Act,

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*A similar argument was expressly rejected by this Court in *Allen*. There, Virginia argued that one of its voting regulations was exempt from Section 5 because the regulation was issued in order to comply with the Voting Rights Act. The Court, however, held that "A state is not exempted from the coverage of § 5 merely because its legislation is passed in an attempt to comply with the provisions of the Act. To hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from coverage—even though it would have the effect of racial discrimination. It is precisely this situation Congress sought to avoid in passing § 5." *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 565, n. 29.

one would ordinarily expect to find such an exemption, if any, in the text of the Act.[20] That is not the case here. Section 5, indeed, uses language that would foreclose any exemption in declaring that "any" change in standards, practices or procedures with respect to voting is subject to the preclearance procedures of Section 5.

Alternatively, one would expect to find the basis for such an exemption in crisp statements by the draftsmen of the Act, the principal proponents and opponents of the Act, and in the reports of the congressional committees. Georgia, however, does not and cannot point to even one such statement. Instead, it seeks to fashion an exemption from the "silence" of congressmen in 1965,[21] while ignoring the legislative history of the Voting Rights Amendments of 1970. But, as noted above, *supra*, pp. 23-24, it is the scope of the latter Act which governs this case.

Even apart from the legislative history of the 1970 amendments, Georgia's argument is without merit. Section 5 of the original Act was enacted to protect Negro voting rights under the Fifteenth Amendment. The lan-

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[20] The approach of this Court to civil rights statutes of the Reconstruction Period has been to "accord [them] a sweep as broad as [their] language." *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), quoting, *United States* v. *Price*, 383 U.S. 787, 801 (1966), and citing, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

[21] The enacting Congress did not endeavor to canvass the types of changes in election laws that might be included or excluded from the Act. It respected "the ingenuity of those bent on preventing Negroes from voting." *Allen*, *supra*, 393 U.S. at 548. Accordingly, the Act "was aimed at the subtle, as well as the obvious, state regulations, which have the effect of denying citizens their right to vote because of their race." *Id.* at 565. Attorney General Katzenbach pointed out that "Even in a sense a most innocent kind of law, as our experiences have indicated time and time again, can be used" to deny or abridge the rights of black voters. Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 62 (1965).

guage of the original Act and the legislative history reveal that Congress intended that Section 5 be given the "broadest possible scope." *Allen, supra*, 393 U.S. at 567. Against this background there is no basis for permitting a covered State to implement potentially discriminatory voting laws in the name of reapportionment when such laws, but for the "reapportionment" label, would be subject to the preclearance procedures of the Act.

2. *The Legislative History of the Voting Rights Amendments of 1970 Demonstrates That Congress Did Not Intend To Exempt Reapportionment from the Requirements of Section 5.*

The legislative history of the Voting Rights Amendments of 1970 makes clear that Congress did not intend to exempt reapportionment laws from the preclearance procedures of Section 5. Proponents and opponents of Section 5 pointed out that redistricting or reapportionment laws enacted in light of the 1970 census would be subject to the preclearance procedures of Section 5 if that section were extended for five years, as proposed. Assistant Attorney General David Norman testified

> ". . . I agree that, from court decisions, all these redistricting plans are going to have to be submitted to the Attorney General for his approval because they are voting changes." Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess. 507 (1970).[21]

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[21] Following the passage of the Voting Rights Amendments of 1970, the Attorney General promulgated interpretive regulations requiring covered States to submit "any change in the constituency of an official or the boundaries of a voting unit (*e.g.*, through redistricting, annexation, or reapportionment). . . ." 28 C.F.R. 51.4(c)(3). These regulations were promulgated after the Department of Justice had for six years served as the principal administrator of the Act and had twice participated in the legis-

Lester Maddox, then Governor of Georgia, assumed that redistricting plans following the 1970 census would have to be submitted:

> "[An] [e]ven more unreasonable aspect of this act comes to light . . . when we consider that after the 1970 Census Georgia will be required to redraw legislative and congressional districts under the law. The Attorney General of the United States could disapprove the apportionment plan even though the Federal courts had approved them." *Id.* at 345.

Attorney General Summer of Mississippi testified that the Mississippi law suspended in *Allen* "was passed by our legislature to comply with the 'one-man, one- vote' rule of *Baker* v. *Carr*, 369 U.S. 186 and *Reynolds* v. *Sims*, 377 U.S. 533." *Id.* at 370. See also Hearings on Voting Rights Act Extension before Subcommittee No. 5 of House Judiciary Committee, 91st Cong., 1st Sess., ser. 8, at 131 (1969).

The statements of Congressmen and Senators reflect the same understanding. Rep. Flowers of Alabama dissented from the House Judiciary Committee Report which recommended extending the Act:

> "The Voting Rights Act of 1965 requires that States covered by said act must submit *every* proposed change in their election process to the Attorney General or the Federal district court in Washington for prior approval. This is a particularly onerous burden because the 1970 census (and recent Supreme Court rulings) will probably require the passage of reapportionment and redistricting acts in all seven

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lative process leading to the enactment and extension of Section 5 of the Voting Rights Act. The Attorney General's interpretation of Section 5, therefore, gives "further support" to the conclusion that the Act covers reapportionment laws, and his interpretation is entitled to "great deference" because of his role in the drafting and administration of the Act. *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390.

States. It will be difficult—if not impossible—to effect the required changes in district lines if the legislators must attempt to perform their duties while shuffling teams of attorneys back and forth to the Nation's Capitol in order to make certain that it is permissible to use the left bank of a particular river instead of a certain section line in redefining the boundaries of one of their State's Senatorial districts." Report of the Committee on the Judiciary to accompany H.R. 4249, H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 22 (emphasis in original).

He repeated his thoughts on the floor (115 Cong. Rec. H 12138 (daily ed. Dec. 11, 1969)), and Rep. Poff of Virginia, a ranking member of the House Judiciary Committee, agreed that

> "a State which is covered today cannot pass a redistricting statute following the 1970 census without the prior permission of the Attorney General of the United States or the District Court in the District of Columbia." (115 Cong. Rec. H 12139 (daily ed. Dec. 11, 1969)).

Representative Ryan, on the other hand, argued that there was a need to continue Section 5 in force in order to monitor changes in election laws that could dilute the voting strength of Negroes. In this connection he said:

> "Another manner used to dilute the black vote is the consolidation of counties which have black voting majorities with counties which have white voting majorities.
>
> * * * *
>
> "Reapportionment and redistricting measures have been another method for diluting the black vote in the South." (Remarks of Rep. Ryan, 115 Cong. Rec. H 12144 (daily ed. Dec. 11, 1969)).

On the Senate floor Senators Stennis and Allen pointed to the forthcoming census and the consequent need for re-

apportionment. Senator Stennis, with Senator Allen's concurrence, then forecast the result of an extension of Section 5:

> "First, the law would demand that they change these districts, then another law—if this would become the law—would require them to come to Washington." (Remarks of Sen. Stennis, 116 Cong. Rec. S3595 (daily ed. March 12, 1969)).

In short, that Section 5 covered reapportionment was brought to the attention of the Ninety-First Congress time and again. There was no dispute among witnesses or legislators over the fact that Section 5 requires covered States to submit reapportionment laws for preclearance. Nor was any proposal made to exempt reapportionment laws from the preclearance procedures of the Act. Consideration was given to the scope of the Act and its effect on the States and the voters therein, and against that background Congress made a considered judgment to extend Section 5 of the Voting Rights Act for five years. In taking this action without so much as a nod toward exemption of reapportionment laws, Congress foreclosed any argument that the statute, by implication, may exempt reapportionment laws from the preclearance procedures of Section 5. See cases cited at pp. 23-24, *supra*.

E. Conclusion.

Section 5 of the Voting Rights Act, as enacted and later reenacted, in terms and purpose is designed to protect against the implementation of state election laws that would dilute or abridge the voting strength of Negro voters. The reapportionment laws of covered States fall naturally within the coverage of Section 5 because reapportment lends itself readily to diluting the voting strength of Negroes. The inclusion of reapportionment laws within the coverage of Section 5, moreover, is not a legal accident. In 1969 and 1970 Congress reexamined the Voting Rights

Act, having the benefit of this Court's decision in *Allen* and almost five years of practical operation of the Act. Congress was fully advised by this Court in *Allen* that the scope of Section 5 was broad indeed and in the Voting Rights Amendments of 1970, Congress adopted the *Allen* Court's construction of Section 5 and "made it a part of the [1970] enactment." See *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948). *Accord*, *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). *Cf. Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237; *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-45 (1954). Moreover, Congress was advised that reapportionment changes required by the 1970 decennial census would come within the requirements of Section 5. Congress nonetheless chose not to alter the Act but rather to extend it in its original terms. Thus, by all standards, reapportionment laws come within the requirements of Section 5 of the Voting Rights Act.

II

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 WAS CONSTITUTIONALLY APPLIED TO ENJOIN THE HOLDING OF ELECTIONS FOR THE GEORGIA HOUSE OF REPRESENTATIVES UNDER THE 1972 REAPPORTIONMENT PLAN

After concluding that Georgia's redistricting plan would occasion a serious potential abridgment of minority voting rights and being advised by the Georgia Legislature that it would not comply with the requirements of Section 5 of the Voting Rights Act, the Attorney General requested the court below to enjoin the implementation of Georgia's new reapportionment plan (*supra*, pp. 6-8). The lower court entered such an injunction, holding, *inter alia*, that "Section 5 of the Voting Rights Act is constitutional as applied" to Georgia's redistricting legislation (A. 75). In this Court Georgia renews its contention that

Section 5, if applied to reapportionment legislation, does not qualify as "appropriate legislation" authorized by Section 2 of the Fifteenth Amendment (Ga. Br. 22-25). Georgia also argues (Ga. Br. 25), as it did below, that Section 5 violates the Guaranty Clause (Article IV, Section 4),[*] and the Full Faith and Credit Clause (Article IV, Section 1).[**] In this part of our brief, amici demonstrate that Section 5, as applied to the Georgia redistricting plan, is legislation fully authorized by the Fifteenth Amendment.

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[*] There is no merit to appellants' argument that the application of Section 5 to the reapportionment plan before the Court would violate the Guaranty Clause. This issue was resolved by this Court's decisions in *South Carolina* v. *Katzenbach*, *Allen* and *Perkins*. In *South Carolina* v. *Katzenbach*, Justice Black in dissent stated that he would hold Section 5 invalid because it denied the States a republican form of government. 383 U.S. at 358-62 (Black, J., concurring in part and dissenting in part). The eight-member majority in that case nonetheless upheld the constitutionality of the section. In *Allen* and *Perkins*, Justice Black again indicated that he felt Section 5 was defective under the Guaranty Clause, (see 393 U.S. at 595-97) (Black, J., dissenting); 400 U.S. at 401-07, 409 (Black, J., dissenting)), yet the Court held that the section was valid as applied to the practices and procedures at issue in those cases, and some of those practices and procedures were similar to features of Georgia's reapportionment plan. (See discussion at pp. 26-27, *supra*.)

[**] Also unmeritorious is appellants' contention that applying Section 5 to the Georgia reapportionment plan would deny Georgia's laws full faith and credit. That clause—"Full Faith and Credit shall be given *in each State* to the public Acts, Records, and judicial Proceedings of every other State" (emphasis added)—governs only the deference which one State must pay to the laws of another State and therefore has no application here. Amici know of no case which has considered this language applicable in determining the relationship between a State's laws and those of the federal government, and none has been cited by appellants. Moreover, the Supremacy Clause (Art. VI, Cl. 2) is witness to the fact that the United States is not bound by the Full Faith and Credit Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

A. Section 2 of the Fifteenth Amendment Authorizing Congress To Enact "Appropriate Legislation" Permits Congress To Employ Any "Rational Means" To Effectuate the Fifteenth Amendment's Prohibition Against Racial Discrimination in Voting.

The Fifteenth Amendment, of its own force, prohibits denial or abridgment of "[t]he right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude." U.S. Const., Amend. XV, § 1. The Amendment further provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2. Thus, the clear terms of the Amendment grant to Congress the power to ensure by "appropriate legislation" that the right to vote is not denied or abridged "on account of race, color, or previous condition of servitude."

This Court, in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324-25 (1966), has already held that Congress, in enacting Section 5, had passed legislation "appropriate" under the Fifteenth Amendment to ensure that the right to vote is not denied on account of race or color. In the course of its opinion, the Court discussed extensively the test to determine when legislation is "appropriate" under the Fifteenth Amendment and hence constitutional (*id.* at 326):

> "The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting . . . .
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> "The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in

all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

> 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' *McCulloch* v. *Maryland*, 4 Wheat, 316, 421."

As the Court indicated, the standard for judging the constitutionality of congressional legislation had been enunciated numerous times in an unbroken line of constitutional decisions. From Chief Justice Marshall's pronouncement in *McCulloch* v. *Maryland* to the words of the Court construing the enabling clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments in *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879),

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power"

to the Court's application of the same principle to the enabling clause of the Eighteenth Amendment, see *James Everard's Breweries* v. *Day*, 265 U.S. 545, 558-59 (1924), to the Court's decision sustaining the Civil Rights Act of 1957, 71 Stat. 637, as "appropriate" legislation under the Fifteenth Amendment in *United States* v. *Raines*, 362 U.S. 17 (1960), and *Hannah* v. *Larche*, 363 U.S. 420, 452 (1960), the Court adhered to the principle that the en-

abling clauses of the Federal Constitution authorize Congress to use "any rational means" to achieve the substantive goals set forth by the Constitution."

In light of these decisions, the validity of Georgia's attack on the constitutionality of Section 5 "as applied" to Georgia redistricting plans depends upon whether such application is a "rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 324. We demonstrate that such application was rational.

B. Section 5 As Applied Constitutes a Rational Means for Effectuating the Constitutional Prohibition of Racial Discrimination in Voting.

The means employed by Congress in Section 5 to effectuate the constitutional prohibition against racial discrimination in voting have already been expressly approved in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 334-35. There the Court held that because certain states, by enacting new voting laws, had sought to avoid court decrees enjoining the operation of old discriminatory laws, it was rational for Congress to require preclearance of "any" new "standard, practice or procedure with respect to voting."[11] In amici's view, *South Caro-*

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[11] The decisions of this Court subsequent to the ruling in *South Carolina* v. *Katzenbach* have continued to reflect this principle. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1964) (holding Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), "appropriate" legislation under Section 5 of the Fourteenth Amendment), and *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (holding 42 U.S.C. § 1982 "appropriate" legislation under Section 2 of the Thirteenth Amendment). See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[12] In *Allen* v. *State Board of Education*, *supra*, this Court, at least by implication, ruled that Section 5 could be constitutionally applied to suspend laws that establish at-large election procedures. Mr. Justice Harlan, concurring in part and dissenting in part, observed that the Court's application of the Act in *Fairley* v. *Patterson*, No.

lina v. *Katzenbach* is dispositive of the constitutional argument made by Georgia unless it can be said that it was "irrational" for Congress to conclude that reapportionment laws like Georgia's are among the type of voting laws that may be employed to deny or dilute the voting strength of Negroes.

We submit that far from being "irrational," this conclusion was in fact compelled. As we have indicated in some detail above (*supra*, pp. 25-28), reapportionment plans can, by their very nature, be used to dilute the voting power of blacks and other minority groups. In redistricting an area, whites can be added to what was formerly a majority black district, or blacks removed from it, so that black voting strength in the district is substantially diluted. If multi-member districts are authorized by state law, the potential for dilution is increased, for a single-member majority black district can be eliminated by combining it with one or more majority single-member white districts to form a multi-member majority white district.

This Court has recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). It has also recognized that reapportionment plans and similar practices can be used to dilute the voting power of minority groups. Thus, in *Fairley* v. *Patterson, decided sub nom. Allen* v. *State Board of Election, supra*, this Court held that the switch from a district-by-district to an at-large election was covered by Section 5 because it allowed for significant

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25, raised for him substantial constitutional difficulties. 393 U.S. at 586, n. 4. The majority in *Allen*, however, stated that the constitutionality of Section 5 had been determined in *South Carolina* v. *Katzenbach* and that the cases before the Court in *Allen* "merely require us to determine whether the various state enactments are subject to the requirements of the Act." 393 U.S. at 548.

"dilution" of the right to vote of blacks. Similarly, in *Perkins* v. *Matthews*, 400 U.S. 379 (1970), this Court held that a municipality's switch from a ward to an at-large election of aldermen along with a municipal annexation of adjacent area was covered by Section 5 because "potential for racial discrimination in voting . . . inheres in a change in the composition of the electorate. . . ." *Id.* at 389. See also *Graves* v. *Barnes*, *supra*, 405 U.S. at 1202; *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143-44; *Burns* v. *Richardson*, *supra*, 384 U.S. at 88; *Fortson* v. *Dorsey*, 379 U.S. at 439; *Gomillion* v. *Lightfoot*, *supra*.

In sum, precedent and analysis combine to show that redistricting plans can significantly affect the right to vote of minority groups. Under the circumstances, the application of Section 5 of the Voting Rights Act of 1965 to Georgia's redistricting plans was constitutionally valid because preclearance of redistricting plans is a "rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 326.

III

THE ATTORNEY GENERAL PROPERLY OBJECTED TO THE GEORGIA REAPPORTIONMENT PLAN WHEN HE WAS "UNABLE TO CONCLUDE THAT THE PLAN DOES NOT HAVE A DISCRIMINATORY RACIAL EFFECT ON VOTING"

The Attorney General objected to the Georgia reapportionment plan because he was "unable to conclude that the plan does not have a discriminatory racial effect on voting" (A. 11, 13). When Georgia indicated it would hold elections under the disapproved plan despite the Attorney General's objection, the Attorney General successfully sought injunctive relief prohibiting such action. Georgia now argues that the Attorney General utilized

the wrong standard of proof in making his objection and that he should have objected only if he had affirmatively found "the change to be discriminatory" (Ga. Br. 34). Accordingly, Georgia argues, his objection was nugatory and the decision of the lower court should be reversed. Georgia's argument has no merit. The State, not the Attorney General, had the burden of proof. When it failed to convince the Attorney General that the new reapportionment law did not have a discriminatory purpose or effect, the Attorney General properly objected to the law."

This Court, however, need not consider whether the Attorney General utilized the appropriate burden of proof. Though the issue of the appropriate burden of proof was initially raised before the district court, that issue was specifically abandoned during the oral argument. There, Mr. Turner for the United States stated that he felt that the "language in the objection letter to the State, that we were unable to conclude that the plan was not discriminatory, was a sufficient basis for objection" (A. 53). "It is our position, Your Honor," said Mr. Turner, "that the United States does not have to prove discrimination" (A. 54). The State of Georgia agreed. By their attorney, Mr. Hill, the State said:

> "I do not want to give up any rights of our clients, but neither do I want to lead the Court into error. It is my understanding of the law that the Justice

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[37] Though Georgia has attempted to cast its argument in terms of whether the Attorney General was required to make a positive finding of discrimination before objecting to the State law (Ga. Br. 33-34), that argument when analyzed is no different than an argument that the Attorney General must bear the burden of proof. Thus, if a positive finding of discrimination were required, either the covered State or the Attorney General would have to produce the information upon which that finding could be based. Since no State is likely to produce information which would deny effect to its own law, as a practical matter the burden of proof would be on the Attorney General. But as we will show below, Congress intended that the burden of proof rest on the State.

Department is not required to prove discrimination" (A. 54).

This concession eliminated from the case the issue of burden of proof since, if the Attorney General need not prove discrimination, the burden must be with the State. Moreover, the State's concession below was sufficiently clear that the district court did not even refer to the issue of burden of proof in its opinion. That issue, accordingly, is not properly before this Court. Having deliberately abandoned their argument regarding burden of proof in the lower court, appellants should not be heard in their attempt to resurrect the issue here. See *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

On the merits, appellants' argument deserves little more attention. The section of the Act which authorizes the Attorney General to object to a change in a State's voting laws is found as an alternate proviso within the same subsection of the Act that grants to the District Court for the District of Columbia power to approve or to object to such changes. From the face of the statute as well as from the context of its enactment, it is evident that when a State submits a plan to the district court the burden of showing nondiscrimination is placed upon the State. The statute requires the State to "institute an action . . . for a declaratory judgment that . . . [the new plan] does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. This is in contrast to earlier federal voting rights laws under which the United States and private plaintiffs had to institute suit and bear the burden of proof. See, *e.g.*, Section 131 of the Civil Rights Act of 1957, 42 U.S.C. § 1971(e); S. Rep. No. 162, pt. 3, 89th Cong., 2d Sess. 5-9 (1965), and cases there cited. The legislative history of Section 5 makes clear that Congress was concerned with the inability under the earlier

statutes of the Attorney General, as plaintiff and bearing the burden of proof, to combat successfully "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th Amendment." H. R. Rep. No. 439, 89th Cong., 1st Sess. 10 (1965). Case-by-case litigation had proved unsatisfactory to secure the rights guaranteed by the Fifteenth Amendment. *Id.* at 9-11. Accord, S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess. 6 (1965) ("Experience has shown that the case-by-case litigation approach will not solve the voting discrimination problem."). "The burden is too heavy," said Congress. *Id.* at 11. In Section 5, the burden was reversed. The State must be plaintiff before the district court and bear the burden of proof.

The State bears the same burden in submissions to the Attorney General. The provision granting the Attorney General power to disapprove changes in state election laws was enacted only to provide a channel of decision alternate to that in the district court. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 549 (1969). There is no indication in the statute or in the legislative history that the decision-making process was to be different when this alternate channel was utilized. Accordingly, the burden of proof should be similar. Indeed, to hold otherwise would be to allow the States to avoid the expressed intent of the framers of the Act, which was to place upon them the burden of showing that any new or revised law would be free from discrimination. The alternate proviso would have become an eviscerating loophole. It is reasonable to believe, therefore, that the same burden of proof rests upon a petitioning jurisdiction before the Attorney General as rests upon it before the district court.** The legislative history of Section 5 confirms this belief.

** Nor are the reasons for imposing the burden on the State difficult to understand. The relevant facts regarding the purpose and effect of each voting change are peculiarly within the knowledge of the entity making the change.

When the Voting Rights Act was reenacted in 1970, no State or political subdivision had submitted a change in voting laws to the District Court for the District of Columbia. All submissions had been to the Attorney General and hence the burden of proof utilized by him in determining whether to interpose an objection was of utmost significance. Congress was aware of the importance of the submissions made to the Attorney General. For example, the House Judiciary Committee stated in its report accompanying the bill:

> "The continuing importance of requiring the submission of new voting laws or regulations for Federal review is also attested by several recent actions taken by the Attorney General in disapproving changes in Mississippi and Louisiana statutes." H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 7 (1969).

But though Congress knew that many important submissions had been made to the Attorney General, it gave no indication that it wished him, in the process of considering those submissions, to assume the burden of proving that State voting laws had a discriminatory purpose or effect. Rather, the House Judiciary Committee in its report recommending legislation to extend the 1965 Act said regarding the appropriate burden of proof:

> "The committee also takes note of the recent decision of the Supreme Court in *Allen* v. *Board of Elections*, in which the Court discussed the history of the enforcement of section 5 and clarified its scope. The decision underscores the advantage section 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color.
>
> * * * *

> "Failure to continue this provision of the act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote." H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969).

Similarly, in the Senate, the "Joint Views" of the majority of the Judiciary Committee recommending extension of the 1965 Act including the provisions of Section 5 at issue here, declared:

> "This section, in effect, freezes election procedures in the covered areas unless the changes can be shown to be nondiscriminatory. . . . [T]he advantage Section 5 produces in placing the burden of proof on a covered jurisdiction [is underscored by *Allen* v. *Board of Elections*]." "Joint Views of Ten Members of the [Senate] Judiciary Committee," 116 Cong. Rec. S 2756 (daily ed. March 2, 1970).*

The testimony at the hearings prior to reenactment of the Act was similar. For example, Senator Bayh, a member of the Senate Judiciary Committee, said, "I personally believe that this business of having the State bear the burden of proof in those areas where you have had a long chain of circumstancial evidence of discrimination is good." Hearings on Amendments to the Voting Rights Act of 1965, Sen. Jud. Comm., 91st Cong., 1st and 2d Sess., at 196. Similarly, Senator Mathias, also a member of the Senate Judiciary Committee, opposed an Administration-sponsored bill to alter Section 5 of the Act on

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* Congressman Poff of Virginia, an opponent of the extension, placed a similar construction on Section 5:

> "A federal law which raises a presumption of illegality against a law newly enacted by a State legislature and suspends its operation until the State comes to the Attorney General or a Federal court and proves its legality offends State sovereignty." H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 14 (1969) (Separate Views of Rep. Poff).

the ground that the "important thrust of the proposed change, is that it casts the burden of proof on the other side." *Id.* at 22.

In sum, in reenacting Section 5 in 1970, Congress believed that the State had the burden of proof in proceedings before the Attorney General and intended to keep the burden there. The Attorney General properly objected to the Georgia reapportionment statute when he was "unable to conclude that the plan does not have a discriminatory racial effect on voting." (A. 11).

IV

THE ATTORNEY GENERAL'S OBJECTION TO THE REAPPORTIONMENT PLAN WAS TIMELY

A. Introduction.

Section 5 provides that any change which has been submitted to the Attorney General for approval may be enforced by the State submitting it if "the Attorney General has not interposed an objection within sixty days after such submission." Relying upon this language, appellant's assert (Ga. Br. 38-44) that the decision below should be reversed because the plan for reapportionment of the Georgia House of Representatives which was enacted on October 14, 1971, and which was first presented to the Attorney General on November 5, 1971, was not objected to by him until March 3, 1972, more than sixty days after the date of submission. We show below that these facts do not warrant reversal. First, the issue of timely objection is not appropriately before this Court. The district court enjoined the use of the March 9, 1972, plan. Georgia concedes that that plan was objected to within nine days of its submission to the Attorney General. Since no other plan was properly before the district court, on conceded facts, Georgia's argu-

ment is meritless. Second, the October 1971 plan, as to which appellants claim no proper objection was made, was not fully submitted to the Attorney General until January 6, 1972. Objection was made on March 3, 1971, less than 60 days later. To be sure the plan was first presented to the Attorney General on November 5, 1971. But that presentation failed to comply with the requirements of a "submission" under the Attorney General's regulations. Amici will show that the Attorney General had the power to promulgate regulations defining the prerequisites of a submission, that the regulations he promulgated were necessary to a rational implementation of the Voting Rights Act and consistent with its provisions, and that the Attorney General's action in accordance with the regulations is entitled to approval by this Court.

B. The Reapportionment Plan Before This Court Is the March 1972 Plan to Which the Attorney General Interposed Objection Nine Days After Its Submission.

The reapportionment plan before this Court, and enjoined by the lower court, was timely objected to by the Attorney General nine days after its promulgation. On March 9, 1972, six days after the Attorney General had objected to Georgia's first plan, the Georgia General Assembly enacted a new plan for reapportionment of the Georgia House. This plan was submitted to the Attorney General on March 15, 1972, and he objected to it on March 24, 1972 (A. 6, 18). It is this March plan which the State of Georgia then attempted to put into effect, and it is the implementation of this plan which the district court enjoined (A. 75).* Thus, the Attorney General objected within the 60-day period to the only reapportion-

* This Court subsequently stayed the enforcement of the district court's order. *Georgia* v. *United States*, No. A-1106 (April 21, 1972). The 1972 election for the Georgia House of Representatives was held pursuant to the March plan.

ment plan before the Court. Appellants' argument that his objection was untimely should thus be rejected.

Appellants seek to avoid this clear-cut result by contending that the two reapportionment plans are in essence one and that it is actually the October 1971 plan which is at issue in this case. There is no basis for this contention. The October plan contained 105 districts while the March plan contained 128 (see pp. 4, 7, *supra*). Forty-nine of the "October" districts were multi-member districts, as compared to 32 of the "March" districts (see pp. 4, 7, *supra*). Fourteen of the "October" districts were altered in the March plan to provide for new districts or new boundary lines (see p. 7, *supra*). Moreover, in enacting the March 1972 plan, the Georgia General Assembly repealed the plan enacted in October. Having statutorily interred the October plan, appellants cannot resurrect it by mere assertion. Only the March plan is here at issue. The Attorney General's objection to that plan was well within the 60-day requirement.

C. The Timing of the Objection to the October Plan Was Consistent with the Attorney General's Regulations and with a Reasonable Construction of Section 5.

1. *Introduction.*

Following enactment of the Voting Rights Amendments of 1970, the Attorney General adopted procedures governing the submission to him of changes in state laws which affect voting.[41] 28 C.F.R. Part 51. These provide, *inter alia*:

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[41] The promulgation of the regulations followed nearly nine months of study and comment. The first draft of the regulations was circulated among interested persons on January 27, 1971, and many comments were received. The regulations were then published and comments invited. 36 F.R. 9781 (May 28, 1971).

"§ 51.8 Computation of time.

"(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

"(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of § 51.10(a). . . ."

"§ 51.10 Contents of submissions.

"(a) Each submission shall include:

. . . .

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. . . . When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

§ 51.18 Obtaining information regarding submissions.

"(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. . . ."

The Attorney General proceeded strictly in accordance with these regulations in requesting additional information to enable him to evaluate the purpose and effect of the October 1971 plan. Thus, appellants' contention that the Attorney General's objection was untimely constitutes an attack upon the validity of the regulations themselves.

2. *The Attorney General Possessed Authority To Promulgate Procedural Rules Necessary To Implement the Voting Rights Act.*

In enacting the procedural regulations at issue here, the Attorney General relied explicitly upon Section 5 of the Voting Rights Act and 5 U.S.C. § 301 (see 28 C.F.R. at 136). These statutes provide authority for his action.

Section 301 of Title 5 authorizes the heads of Executive departments, including the Attorney General,[*] to:

> "provide regulations for the government of his department, the conduct of its employees, [and] the distribution and *performance of its business* . . . ." (Emphasis added.)

The enforcement of Section 5 is without question the business of Justice Department and thus it is reasonable to read Section 301 to authorize the Attorney General to adopt procedural regulations for its administration.

The cases confirm this reading. *United States* v. *Morehead*, 243 U.S. 607 (1917), and *Smith* v. *United States*, 170 U.S. 372 (1892), hold that Section 301 authorizes an "Executive department" to enact regulations implementing a statute which it has been given the responsibility to enforce. *FCC* v. *Schreiber*, 381 U.S. 279 (1965), holds that this power is to be broadly construed. Thus the Attorney General's procedural regulations regarding submissions allow him to conduct properly the "performance of [his] business" and are authorized by 5 U.S.C. § 301.

Further, Section 5 itself implicitly authorizes the Attorney General to promulgate implementing regulations. This Court has recognized that in enacting a regulatory statute and authorizing an agency to enfore it, Congress may have intended, even in the absence of express author-

[*] In 5 U.S.C. § 101 the Department of Justice is listed as one of the "Executive departments" to which 5 U.S.C. § 301 applies.

ization, to delegate to the agency the power to enact regulations necessary to the proper implementation of the law. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218-19 (1943); see also K. Davis, 1 *Administrative Law* § 5.03, at 299, n. 2 (1958); cf. *FCC* v. *Schreiber*, *supra*, 381 U.S. at 289. The duty of the Attorney General to approve or reject changes in state law has demanded that he gain an understanding of the information needed to make such a submission satisfactory. Only he, and not the court, is faced with this problem.[a] Accordingly, it is reasonable to conclude that Congress intended that the "administrative procedures [should] be designed by [the Attorney General who is] most familiar with the regulatory problems involved." *FCC* v. *Schreiber*, *supra*, 381 U.S. at 290.[a]

In sum, then, the Attorney General was authorized by 5 U.S.C. § 301 and Section 5 of the Voting Rights Act to adopt regulations necessary to enable him to carry out his duties under the latter section. We show below that the regulations at issue fall within this authority.

3. *The Attorney General's Regulations Are Necessary to Effective Implementation of Section 5.*

Section 51.3 of the Attorney General's regulations states that the 60-day period for objection shall commence running only when the Attorney General has facts necessary to a proper evaluation of the change in the state voting

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[a] To obtain clearance from the District Court for the District of Columbia, a State must file a complaint. It is only the Attorney General who receives a "submission."

[a] Compare *Allen*, *supra*, 393 U.S. at 571, where the Court looked in vain for regulations of the Attorney General which would govern "submission," with *State Board of Election Commissioners* v. *Evers*, 405 U.S. 1001, 1004 (1972) (Blackmun, J., joined by Rehnquist, J., concurring), where two Justices pointed out that the newly promulgated regulations of the Attorney General would in the future alleviate the problem presented by that case.

laws. Thus, complete presentations are "submissions" which will start the 60-day period; incomplete presentations are not "submissions" and do not commence the running of the 60 days. To perform effectively, the Attorney General must issue such regulations. Any other rule would leave him without the facts needed to perform responsibly the job which Congress called upon him to perform, that is, the review of changes in the voting laws of covered States to make certain that they are not racially discriminatory in either purpose or effect.

Under Section 5, any State or political subdivision within the coverage of the Act may call upon the Attorney General to determine whether a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" is free of race discrimination in both purpose and effect. The range and variation of the provisions that may be presented to him are vast. See *infra*, n. 48. Some will be quite difficult to evaluate. Given the breadth of the responsibility assigned to him by the Congress, it is imperative that the Attorney General require that the information necessary for the proper evaluation of a change be submitted before he is called upon to make a judgment as to its potential for racial discrimination."

Common sense suggests that Congress must have so intended. Further support for that conclusion is provided by *American Farm Lines* v. *Black Ball Freight Services*, 397 U.S. 532 (1970), which involved the validity of a grant of temporary operating authority made by the Interstate Commerce Commission. The primary issue in the case was whether the carrier involved had in fact ade-

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"The Attorney General and his representatives are, of course, the individuals best qualified to determine what information should be presented in connection with a submission. See *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-91; see also *FCC* v. *Schreiber*, *supra*, 381 U.S. at 290.

quately complied with Commission regulations specifying the information it was required to submit in connection with its application for such authority. The Court split on this issue. However, both the majority and the dissent agreed that regulations requiring the submission of information were essential if the Commission was to carry out its statutory duty of ruling on requests for temporary authority. *Id.* at 538, 548.[*] In view of the complexity of the decisions the Attorney General is required to make under Section 5 and the fundamental importance of the substantive rights involved, the Attorney General's need for information is at least as great as that which the Court found sufficient to justify the similar regulation by the ICC in *American Farm Lines*.

We submit, then, that the Attorney General's regulation defining the nature of a submission under Section 5 in terms of the data to be included is necessary to the proper administration of the Act and within his statutory authority. Similarly, his regulation providing that the 60-day period for objection does not commence until such data are received must also be authorized for the former regulation would be meaningless without the latter.

This Court in *Allen* and the district court below indicated one of the bizarre results which would follow were these regulations not sustained. In the Mississippi cases decided with *Allen*, appellees argued that even if the changes involved there were covered by Section 5, they

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[*] The dissent was particularly emphatic on this point. It stated that the regulations implemented "not only the statutory standard [regarding grants of temporary operating authority], but also the fundamental scheme of our national transportation policy," and that they were "designed to elicit information critical to determining whether in light of congressional policies a particular factual situation warrants the grant of a temporary authority." *American Farm Lines* v. *Black Ball Freight Service*, *supra*, 397 U.S. at 543, 596.

could nonetheless be put into effect because the Attorney General had become aware of them, thus they had been "submitted," and the Attorney General had not objected within 60 days of this "submission." Not surprisingly, this Court rejected the argument, stating:

> "While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner." *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 571.

Appellants' challenge to the regulations is not substantially different from that rejected in *Allen*. Carried to its logical conclusion, it would allow a covered State to present the Attorney General with the statutory words of a change in a voting law or procedure bereft of the information necessary to a proper evaluation of that change. It would require the Attorney General to pass on the plan within 60 days although he did not have the requisite information and had been unable to obtain it. The court below recognized that this would be a consequence of appellants' argument. Moreover, the court recognized that it was not merely a theoretical possibility, but that it had occurred in this very case.[47] (See A. 74). Because such a ruling would have required the Attorney General to have acted irrationally, the court rejected the argument that Congress could have intended such a result.

Acceptance of appellants' argument would leave the Attorney General little choice but to object to any change

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[47] In this case the State of Georgia did not submit the additional information necessary to allow the Attorney General properly to evaluate the October 1971 reapportionment plan until 62 days after it submitted the plan (A. 9). This was 48 days after the Attorney General had notified the State that this additional information would be required (A. 89).

affecting voting which was at all complex if the State had not presented the information necessary to determine whether the change had a potential for discrimination. Indeed, given the fact that the Attorney General could not independently investigate all such changes because of the limited resources at his command,[48] he would appear duty bound to object wherever he could not find that the change was free of a potential for racial discrimination. But there is no reason for this Court to read the provision simply to compel the Attorney General to render some decision within 60 days of the time a covered State submits a change to him in some way. Rather, the Court should accept the construction placed upon the statute by the Attorney General which will allow him to make a reasoned decision by recognizing that he possesses the authority to specify that the 60-day period will commence only when the information essential for such a decision has been presented to him. Such an interpretation is not only necessary to the effective implementation of Section 5, it is also helpful to covered States, for it allows them to supplement their initial submissions when they are defective and thereby gives them a better chance of obtaining clearance for changes in their voting procedures and laws without the necessity of litigation.

Finally, whether or not the regulations are controlling upon the courts by reason of the authority vested in the Attorney General, they are entitled to great weight by the Court in construing the 60-day provision of Section 5. An administrator charged with enforcement of a statute is free to issue interpretive regulations and since he is the one most familiar with the statute and the problems which arise under it, these regulations are entitled

[48] Since 1969, the Attorney General has reviewed 881 reapportionments (U.S. Br. 26 n. 19).

to considerable deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)."

Indeed, this Court has already ruled that the Attorney General's construction of the very statute at issue here is entitled to such deference. Thus, in *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-91, where another matter of interpretation of Section 5 was at bar, the Court said:

> "Our conclusion . . . draws further support from the interpretation followed by the Attorney General in his administration of the statute. '[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)."

In sum, the Attorney General's regulations providing that a change is submitted only when the information necessary to evaluate it is received should be given au-

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"The statute involved in *Skidmore* was the Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938). Final responsibility for interpreting and even for applying the Act in the first instance lay with the courts, not the Wage-Hour Administrator. *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 138. Indeed, "[a]fter considering a bill granting a general rule-making power to the Administrator, Congress [had] adopted a measure withholding such power." 1 K. Davis, *supra*, § 5.03, at 300-01. This Court nonetheless held that interpretive bulletins issued by the Wage-Hour Administration were to be given considerable weight by the courts in construing the statute, stating: "This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin. We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140. See also *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-91.

thoritative effect by the Court, and in any event, his c
struction of the statute, based upon more than six ye
experience in its administration, is reasonable and n
sary to an effectuation of the purpose of Section 5.
such, it should be adopted by this Court and appella
argument that the Attorney General's objection to
October plan was untimely should be rejected.

CONCLUSION

Wherefore, amici urge this Court to affirm the decisi
of the district court and to remand with directions th
a new reapportionment plan be adopted and reviewe
pursuant to Section 5 and that new elections be held
mediately upon approval of the revised plan by the A
torney General or the District Court for the District o
Columbia.[**]

Respectfully submitted,

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[**] Amici note that the district court can fashion an adequate remedy without prescribing the particular changes necessary in the present redistricting scheme. Appellants may be placed under an injunctive decree to fashion a plan satisfactory to the Attorney General or the District Court for the District of Columbia. This remedy would comport with the statutory scheme of Section 5 which contemplates that revisions in voting laws be submitted either to the Attorney General or to the District Court for the District of Columbia. The relief granted would be similar to that suggested by this Court in *Perkins* v. *Matthews*, 400 U.S. 379, 396-97 (1971), that "it might be appropriate to enter an order affording local officials an opportunity to seek federal approval. . . ."

APPENDIX

Letters Sent on Behalf of the Attorney General Objecting to Reapportionment Plans Submitted to Him Pursuant to Section 5 of the Voting Rights Act of 1965

A-2 Letter from Assistant Attorney General Norman to Griffin Norquist, Attorney at Law, Yazoo County, Mississippi, July 19, 1971.

A-5 Letter from Assistant Attorney Norman to Jack P. F. Gremillion, Attorney General, State of Louisiana, August 20, 1971.

A-11 Letter from Assistant Attorney General Norman to Leon F. Hannaford, County Attorney, Tate County, Mississippi, December 8, 1971.

A-13 Letter from Assistant Attorney General David L. Norman to Thomas Watkins, Attorney at Law, Hinds County, Mississippi, July 14, 1971.

Jul. 19, 1971

Mr. Griffin Norquist
Attorney at Law
Post Office Box 87
Yazoo City, Mississippi 39194

Dear Mr. Norquist:

This is in reference to the proposed redistricting plan which was submitted to the Attorney General by you on behalf of Yazoo County, Mississippi, under Section 5 of the Voting Rights Act of 1969.

We have given careful consideration to the submitted changes and supporting information as well as data compiled by the Bureau of Census and information we have received from private citizens. On the basis of this information we are unable to conclude that the changes submitted by Yazoo County satisfy the constitutional requirements to which Section 5 is directed.

We have attempted diligently to obtain and apply all available information bearing on the racial effect of the submitted supervisors' districts. In doing so, we find that the population of proposed District 1 is apparently nearly twenty percent below the norm of equal representation per district for Yazoo County, and that the population of District 4 is approximately fifteen percent above that norm. Accordingly, these districts would be, respectively, over and under represented. Further, our analysis indicates, for example, that, numerically, the black population of proposed District 1, which is apparently overrepresented, is smaller than the black population of the

other four submitted districts; whereas the black population of District 4, which apparently is underrepresented, is larger than the other submitted districts. Thus, not only are there serious problems with the redistricting plan under the one man, one vote requirement, but it is not sufficiently clear to us that the plan meets Fifteenth Amendment requirements.

Our difficulty is compounded by the fact that the district boundary lines within the City of Yazoo unnecessarily divide the black residential areas into each of the five districts. These lines do not seem to be related to numeric population configurations, or to considerations for district compactness, or to a standard of regularity of shape. In short, while we do not imply a purpose to discriminate, we are required by the Act to look to the effect as well; and under the circumstances here, we cannot approve the proposed change.

With respect to the reregistration of voters which has been conducted in Yazoo County, it is our understanding that under Mississippi law and by order of the Yazoo County Board of Supervisors no person will be denied the right to vote in the forthcoming elections if he has been properly registered on either the old or the new set of books for the required statutory period. Based on this understanding, the Attorney General will not interpose an objection to the reregistration at this time. Because of our objection as noted above to the redistricting, however, the proposed districts cannot be used to deny any registrant the right to vote.

I am not unmindful of the problems created by this action coming, as it does, so close to the county's scheduled August primary election. I assure you of our continuing interest in discharging our responsibilities under

the Voting Rights Act in a way that will achieve the purposes of the Act while minimizing disruption to local authorities. To that end I offer the full cooperation of this office in dealing with these problems.

Sincerely,

DAVID L. NORMAN
Acting Assistant Attorney General
Civil Rights Division

DEPARTMENT OF JUSTICE

Washington

Aug. 20, 1971

Honorable Jack P. F. Gremillion
Attorney General
State of Louisiana
Baton Rouge, Louisiana

Dear Mr. Attorney General:

This letter is in reference to the enactments amending Sections 35 and 35.1 of Title 24 of the Louisiana Revised Statutes of 1950 reapportioning districts for the Louisiana Senate and House of Representatives. These reapportionment enactments were submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as construed by the Supreme Court, *Fairley* v. *Patterson*, 393 U.S. 544, 569 (1969); *Perkins* v. *Matthews*, 400 U.S. 379, 394 (1971).

Your submission was initially received on July 2, 1971, and additional material necessary to evaluate the changes was received on July 21 and July 26, 1971.

We have given careful, and expedited, consideration to the submitted changes and the supporting information as well as information received from private citizens and data supplied by the Bureau of the Census.

However, after consideration of the proposed plan to reapportion the legislature, I must inform you that the Attorney General is unable to conclude that the reapportionment plan does not have the purpose and will not have the effect of abridging the right of Negro citizens of Louisiana to vote on account of race or color. For

the reasons set forth below, on behalf of the Attorney General, I must interpose an objection to the proposed reapportionment of the House of Representatives and State Senate.

In the limited time available, we have identified several districts in widely scattered parts of the state in both houses of the legislature where there appears to be a discriminatory racial effect as defined in decisions such as *Gomillion* v. *Lightfoot*, 364 U.S.C. [*sic*] 339; *Sims* v. *Bagett*, 247 F. Supp. 96; and, *Allen* v. *Board of Elections*, 393 U.S. 544. Since any modification of these districts will necessarily affect other districts, and because time restrictions prevent a more detailed analysis, this objection is directed to the entire plan.

For example, the House plan allocates the 105 members to 53 districts made up of 28 single member districts and 25 multi-member districts electing up to 8 members. In Orleans Parish, the 1970 census indicates there are 593,471 persons of whom 267,244, or approximately 45 per cent, are black. The parish is divided into 11 districts electing 18 representatives, seven from single member districts. Notwithstanding the existence of a number of identifiably black residential neighborhoods, only two districts, No. 43 and No. 52 (2 members) have a black majority population, and in No. 52, the black voting age population is less than a majority.

In determining whether this result was occasioned by the way the district boundaries were drawn, we found that District 43, the present residence of the state's only black legislator, is an extraordinarily shaped 19-sided figure that narrows at one point to the width of an intersection, contains portions of three present districts, and suggests a design to consolidate in one district as many black residents as possible. Census data show 33,364 blacks, 3,133 whites, and 101 other races in this district.

The district is also overpopulated from the ideal population of 34,697, by more than 5.5 per cent.

On the other hand, District 52, an adjoining district electing two members, is made up of parts of two former districts and contains, according to the census, 33,010 blacks, 26,452 whites, and 233 other races, or about 55 per cent black. We compute the voting age population, however, at 19,079 (49.62%) black, 19,369 white, and according to state records, the registered voters are 12,582 white and 8,884 blacks. This district is significantly underpopulated (29,847 per member) and the proximity to overpopulated District 43 suggests that the two could have been easily equalized. Moreover, our analysis show no compelling reason for this district being a two member district and none has been suggested, although were it divided into two single member districts along a north-south axis similar to other districts in this area, one of the resulting districts would have had a clear preponderance of black voting age population.

On the Senate side, we find that although the two Orleans house districts discussed above (43 and 52) are adjacent districts and have a joint population (96,293) well within the deviation from the ideal (93,401) used for single member senate districts; in the plan, they were not combined in what would have been a heavily majority black district. Instead a new boundary was constructed using all of House District 52 and part of House District 43, and combining them with majority white Districts 44, 45 and most of District 46. The result is two member senate district 23 with a nominal black population majority of 52.6 per cent (92,332 black, 82,886 white) but a calculated voting age population of 53,359 black (47.0 per cent) and 60,150 whites.

Another example of apparent racial effect resulting from the selection of house districts in Orleans is Dis-

trict 48. This is a three member district made up of two non-contiguous parts separated by the Mississippi River with one situated over a mile downstream from the other. According to the census, this district is populated by 45,478 blacks (48.5%), 47,724 whites, and 530 other for a total of 93,782 persons. The northern segment of the districts, however, is 33,145 white, 43,407 black (56.3%). The racial character of this district was thus reversed by adding in the non-contiguous southern part (14,579 white, 2,046 black). We have been unable to discover any community of interest between these two sections and also note that a logical subdivision of the northern segment would have resulted in at least one predominantly Negro district.

We have found similar racial effects in the formation of districts in other parts of the state. House District 33, for example, combines populous Caddo Parish (Shreveport) with adjoining DeSoto Parish. DeSoto has a majority black population which is merged into Caddo's predominantly white population to form a seven member district elected at large.

On the Senate side, however, an entirely different plan is used for this area in which DeSoto is joined with only a portion of Caddo and with Bienville and Claiborne Parishes to form a white majority district separated in two parts by Bossier and Webster Parishes. While all six parishes are denominated as Senate District 2, the district in fact is subdivided into three divisions with Shreveport electing two senators, Bossier and Webster electing one, and the above described split district electing the other.

In evaluating the rural areas of the state we find similar problems. For example, there are three majority Negro parishes, Madison, East Carroll and Tensas which lie next to each other along the Mississippi River and share many common interests such as forming State

Judicial District Six. The joint population of these parishes (37,689) is well within deviation from the ideal used in other districts and could have formed a single member house district. Instead, Madison and East Carroll were joined with the majority white inland parishes of Richland and Franklin to form two member majority white District 39. Tensas was joined with majority white Concordia Parish to form single member District 40. In the senate plan for this area the three subject parishes remained separate and two other parishes were added to House District 39 to form Senate District 4.

Accordingly, our review of this plan indicates that there are apparent racially discriminatory effects in both houses of the legislature in widely disparate parts of the state, and that to correct these effects the plan would have to be substantially revised in whole or in part. If the legislature undertakes such revision you may wish to call to its attention the opinion of the District Court for the Southern District of Mississippi in *Connor* v. *Johnson* (C.A. No. 8870, S.D. Miss., May 18, 1971). In that case, the court in drafting its own reapportionment plan indicated a preference for minimizing the number of multi-member districts. We make this suggestion only because many of the inferences of discriminatory effect in the present proposal involve multi-member districts.

We have reached the conclusions set forth in this letter reluctantly because we fully understand the complexities facing any state in designing a reapportionment plan to satisfy the needs of the state and its citizens and, simultaneously, to comply with the mandates of the federal Constitution. We are persuaded, however, that the Voting Rights Act compels this result. Under that Act, of course, the only function of the Attorney General is to object or approve submitted legislation and we are not authorized nor would it be apropriate for us to recommend alternative approaches. Much of our analysis was

based on information furnished by the U.S. Census Bureau and, should it be of use to you in understanding our determination or in advising the legislature further, we would be pleased to make it available.

I should like to add that the Voting Rights Act of 1965 permits seeking approval of all changes affecting voting by the United States District Court for the District of Columbia irrespective of whether the change has previously been submitted to the Attorney General.

Inasmuch as the United States District Court for the Eastern District of Louisiana has deferred proceedings in pending cases involving this reapportionment plan awaiting the determination of the Attorney General under the Voting Rights Act, I am taking the liberty of furnishing a copy of this letter to the Court.

Sincerely,

/s/ David L. Norman
DAVID L. NORMAN
Acting Assistant Attorney General
Civil Rights Division

Dec. 8, 1971

Mr. Leon F. Hannaford
County Attorney
Tate County
Senatobia, Mississippi 38668

Dear Mr. Hannaford:

This is in reference to your submission to the Attorney General, pursuant to Section 5 of the Voting Rights Act of 1965, of the reapportionment and changes in precincts and polling places for Tate County, Mississippi. Based on our understanding of September 1, 1971 the sixty-day period with respect to this submission was suspended until we received from the Bureau of the Census corrected 1970 U.S. Census statistics for Tate County.

On October 6, 1971 this Department received those corrected census statistics. As I am sure you are aware, our review of your 1966 reapportionment was based on these 1970 U.S. census statistics and other additional information you provided to us.

On the basis of our analysis of these revised census statistics and other available information, we are unable to conclude at this time that the submitted reapportionment plan will not have the effect of denying or abridging the right of the Negro citizens of Tate County to vote on account of their race or color. Therefore, on behalf of the Attorney General, I must interpose an objection to this reapportionment plan.

This objection is based on variances in equal representation among the five districts. The revised census statistics of Tate County indicate, for example, that District 1 with a population of 8145 is the most underpopulated and consequently overrepresented district in Tate

County. District 1 also has a 63.9% white-majority. District 3 has a population of 4403 and is the most overpopulated and consequently underrepresented district in the county. In addition, District 3 with a 56.9% black majority has the largest concentration of blacks in Tate County.

Additionally, aside from this racial disparity, the plan presents deviations from equal representation which seem inconsistent with the one-person, one-vote requirement. The deviations in the proposal range from a minus 15.1% in District 1 to a plus 18.7% in District 3 for a total deviation of 33.8%. This total deviation from equal representation exceeds any deviation so far approved by the courts. See *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), and *Abate* v. *Hundt*, 403 U.S. 182 (1971).

In view of this objection, I suggest that the Board of Supervisors may wish to devise another reapportionment plan for Tate County. Any new proposal, of course, should be submitted either to the Attorney General or to the United States District Court for the District of Columbia pursuant to Section 5. I suggest that any new plan be submitted as soon as practical so that the matter can be resolved and the plan can be implemented prior to the 1972 scheduled elections.

If you have any questions raised by any matters discussed in this letter or if I can aid your resubmission in any way, do not hesitate to call on me or my staff.

Sincerely,

DAVID L. NORMAN
Acting Assistant Attorney General
Civil Rights Division

A-13

July 14, 1971

Mr. Thomas Watkins
Watkins & Eager
Attorneys at Law
Post Office Box 390
Jackson, Mississippi 39505

Dear Mr. Watkins:

This is in reference to the proposed redistricting plan which was submitted to the Attorney General by you on behalf of Hinds County, Mississippi, under Section 5 of the Voting Rights Act of 1969.

We have given careful consideration to the submitted changes and supporting information as well as data compiled by the Bureau of the Census, court records and information we have received from private citizens. On the basis of this information we are unable to conclude that the changes submitted by Hinds County satisfy the constitutional requirements to which Section 5 is directed.

In comparing the data compiled by Comprehensive Planners, Inc., with that found by the Bureau of the Census for the county's supervisors' districts prior to redistricting, we find substantial and apparently irreconcilable discrepancies in the population and location of residents of Hinds County. It is our view that for purposes of reapportionment and Voting Rights Act evaluation the figures supplied by the Bureau of Census must be accepted as accurate. Unfortunately, these compilations are not made in such a way that one can determine either the households or population figures for the new districts submitted by Hinds County.

Thus, we have encountered a problem similar to the problem faced by the three-judge panal during the hear-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

THE STATE OF GEORGIA, et al.,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

On Appeal From The United States District Court For The Northern District Of Georgia

REPLY BRIEF FOR APPELLANTS

ARGUMENT

The Brief for the United States and a Brief Amici Curiae for the NAACP *et al.* have been filed. The appellee and amici would have this Court decide substantial questions (the Court has noted probable jurisdiction) without full discussion of the consequences.

The Court will recall that in *Fairley v. Patterson*, 393 U.S. 544 (1969), decided with *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Government took the position that there was ". . . no need here for the Court to reach the question whether Section 5 extends to the typical sort of apportionment litigation and districting

changes which have followed in the wake of this Court's decision in *Baker v. Carr*. . . ." (Memorandum of the United States as Amicus Curiae, filed in *Fairley, supra;* see Ga. Br. pp. 18-19).

In *Allen*, the Court found that ". . . the question of whether §5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time." (393 U.S. at 569).

Nevertheless, the Government and amici both argue now that notwithstanding the restriction urged upon and adopted by the Court in *Allen/Fairley*, that decision is controlling in this reapportionment case. We submit that this Court again is being asked to decide far reaching questions without being fully apprised of the governmental impact of such decisions.

The last of the questions presented is not the least significant and could be considered the most significant in terms of the balance of power as between Congress and the Executive Branch. For that reason, and to show the complexity of the administrative problems which the application of Section 5 to reapportionment and redistricting will create, the four questions will be considered in reverse order.

QUESTION 4.

The fourth question is: "Does the Attorney General have the power to extend the 60 day time limit Congress placed on him in Section 5 of the Voting Rights Act of 1965?" (Ga. Br. p. 4) This question, on which the Court noted probable jurisdiction, involves the power of the Attorney General to promulgate regulations, without

statutory authority, which regulations contravene the time limit fixed by Congress. The Government's comparable question is: "Whether the objections interposed by the Attorney General were timely." (U.S. Br. p. 2)

In Section 4 of Georgia's Brief, it was pointed out that no authority has been cited which authorizes the Attorney General to extend, by regulation or otherwise, the 60 day limit fixed by Congress for the suspension of State voting laws (Ga. Br. p. 39). Five pages were devoted to that subject (Ga. Br. pp. 39-44).

The Government's brief cites no authority for the Attorney General to promulgate regulations, and no authority for him to amend the laws of Congress. The Government argues that the question is moot, but that in any event, the Attorney General complied with his regulations (U.S. Br. pp. 43-44). We do not dispute that he complied with his regulations (as to time). We question why he needed additional information and 120 days to invalidate multi-member districts when he knew from the first day that the 1971 reapportionment plan used such districts (A. 19, Ex. A, R. 21-51). We have suggested that he could have stated, following this Court's decision in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), that he did not intend to be bound by it as to the seven covered states (Ga. Br. p. 38). But we have not disputed that he complied with his regulations as to time.

Our dispute with the Government is that the Attorney General's regulations were written without any statutory authority and that as written they are directly contrary to the law as written by Congress. The Government has cited no authority for the proposition that the Attorney General has the inherent power to promulgate regulations.

Amici contend that 5 U.S.C. §301 should be read to authorize the Attorney General to adopt regulations (Amici Br. p. 51). They assert that two cases confirm their reading of §301, citing *U.S. v. Moorehead*, 243 U.S. 607 (1917), and *Smith v. U.S.*, 170 U.S. 372 (1898).[1] In our brief, we pointed out that §301 authorizes the head of an Executive Department to prescribe regulations for the *internal* government of his department, conduct of its employees, distribution and performance of its business, and custody, use and preservation of its records, papers and property, citing *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 875 (C.A. 5, 1961).

In *U.S. v. Moorehead, supra*, cited by amici, Congress had expressly authorized the Commissioner of the General Land Office to enforce and carry into execution, by appropriate regulations, every part of the provisions of the Public Lands Act (243 U.S. at 613, fn. 6, Rev. Stat. §2478). Contrary to amici's assertion, *Moorehead* does not "hold" that §301 authorizes an Executive Department to enact *external* regulations for the performance of its business.

In *Smith v. U.S., supra*, the Government brought suit against an official of the General Land Office and the sureties on his official bond. It is true that the regulation in question required a citizen applying to purchase public land to make payment before action would be taken on his application. However, the question decided in that case was whether the monies received were public monies within the meaning of the law and the surety bond. The Court held the regulation to be valid as to the public

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[1] *F.C.C. v. Schreiber*, 381 U.S. 279 (1965), cited by amici, does not involve any interpretation of, or reference to, 5 U.S.C. §301.

official and the funds in his hands to be public money. The Court did not hold the regulation to be valid externally.

N.L.R.B. v. Capitol Fish Co., supra, was correctly decided. A March 15, 1883 opinion of the Attorney General construed the predecessor of 5 U.S.C. §301 the same way, stating that it did not authorize a department head to promulgate regulations for third parties. 17 Op. Atty. Gen. 524 at 525 (1883).

Amici are requesting this Court to interpret 5 U.S.C. §301 so as to give broad powers to the heads of all Executive *and Military* Departments to prescribe regulations for the performance of their business with all citizens. Such sweeping changes in the separation of powers are not to be undertaken lightly.

Amici also argue that Section 5 of the Voting Rights Act itself implicitly authorizes the Attorney General to promulgate implementing regulations, citing *National Broadcasting Co. v. United States,* 319 U.S. 190, 218-19 (1943), and *F.C.C. v. Schreiber, supra.* In the *National Broadcasting Co.* case, the F.C.C. had been explicitly authorized by Congress to make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the Act. 319 U.S. at 215, 47 U.S.C.A. §303(f). In *Schreiber, supra,* the F.C.C. Act similarly authorized the F.C.C. to adopt regulations for the conduct of its proceedings (381 U.S. at 289). The power to promulgate regulations is not to be implied from Section 5 of the Voting Rights Act.

Moreover, even if the Voting Rights Act had specifically empowered the Attorney General to prescribe

regulations, the Attorney General could not extend the sixty day time limit placed on him by Congress.

This Court is being asked to hold that the Attorney General has the power to promulgate regulations, for the conduct of seven States, without any statutory authority. The Court is being asked to hold that when Congress says 60 days, the Attorney General can, by regulations adopted without authority, grant himself an extension. The Court is being asked to hold that when Congress put no time limit on the District Court for the District of Columbia to decide Section 5 cases, but put a 60 day limit on the Attorney General (Ga. Br. pp. 50-51), that the Attorney General's regulation is consistent with what Congress intended (U.S. Br. p. 44). Why then did Congress say that a change in State voting laws would become effective, without any approval, if the Attorney General has not interposed an objection within 60 days?

Under Section 5, a change in State voting law does not become effective when timely disapproved by the Attorney General. Thus, Georgia's 1972 House reapportionment plan, including its repeal of the 1971 plan, is not in effect (assuming questions 1-3 are to be decided in favor of the Government). The Government's argument that the 1971 plan has been repealed (and that Georgia's fourth question presented on appeal is mooted by that repeal; U.S. Br. p. 43) overlooks the fact that the repealer clause in the 1972 plan has been suspended and is not in effect. Mr. Norman objected in his March 24, 1972 letter to the entire 1972 Act (S.B. 690) (A. 13). He did not exclude from his objection the provision which would have repealed the 1971 Act (A. 13). He disapproved and suspended the whole thing. The repealer clause in the 1972

plan is not in effect. Thus, if his March 3, 1972 objection to the 1971 reapportionment plan submitted November 5, 1971 (A. 32, 33) was not timely, the 1971 plan is in effect.

The question of timeliness is not moot. It is, instead, properly before the Court and of vital importance, not only to the affected States but to Congress as well. Must Congress pass a law saying "When we say you have 60 days in which to act, we expect you to act within 60 days"?

In addition to arguing that the 1972 plan repealed the 1971 plan, amici also contend that only the 1972 reapportionment plan was before the District Court (Amici Br. pp. 48-49). No such contention has been made by the Government, the plaintiff in this case. It was the Government which attached Georgia's 1971 reapportionment plan to its complaint (A. i), attached its letter disapproving the 1971 plan to the complaint (A. i), and attached Georgia's submission of the 1971 plan to its complaint (A. i). It was the Government that prayed in its complaint that Georgia be enjoined from implementing both its 1971 and 1972 reapportionment plans (A. 7).

Both the 1971 and 1972 plans were before the District Court because the Government put them there. After the District Court overruled (A. 58) Georgia's defense number 4 (A. 26-27), the Court enjoined Georgia from holding elections "under the present reapportionment plan" (A. 75). It is the overruling (A. 58, A. 74) of Georgia's defense number 4 which is before this Court.

The fourth question presented is properly before this Court. It raises questions of vital importance to the balance and separation of power between Congress and the

Executive Branch. The question should not be decided without full recognition of its scope and impact.

QUESTION 3.

The third question presented is: Does Section 5 empower the Attorney General to disapprove a law which he does not find to be discriminatory but about which he is unable to reach a decision?

The Government's Brief treats the question as if it involved only "burden of proof." The question is much more significant. What of the Justice Department's indecisive denial policy (Ga. Br. pp. 31, 34-35, 38)? By what authority has the Attorney General adopted regulations imposing a burden of proof test (Ga. Br. pp. 31, 39-40)? By adopting a burden of proof standard, has the Attorney General constituted his staff as a court, contrary to Section 5, *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969), and Article III of the Constitution?

How can the burden of proof be on the State, when the Attorney General's regulations provide that his decision will be based upon material not available to the State? (Ga. Br. pp. 32-34). See *Morgan v. United States*, 304 U.S. 1, 18-19 (1938), *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), *Greene v. McElroy*, 360 U.S. 474 (1959), *Hannah v. Larche*, 363 U.S. 420, 493, dissenting opinion by Mr. Justice Douglas (1960).

These issues have not been mentioned by the Government in its brief because the third question posed by the Government is narrower than the one on which the Court noted probable jurisdiction.

Moreover, the Government says that this question is outside the permissible scope of judicial inquiry and thus not entitled to consideration by this Court (U.S. Br. p. 38), citing *Allen, supra,* and *Perkins v. Matthews,* 400 U.S. 379 (1971). Those were suits by citizens to enjoin the use of State laws which had not been submitted to the Justice Department. This is a suit by the Government to enjoin the use of a State law which was submitted, and disapproved. One defense is that the disapproval was invalid, being both indecisive and based upon an improperly imposed burden of proof standard (A. 25). The Court is entitled to consider the validity of that defense and, hence, the validity of the Attorney General's method of disapproval. This is the only Section 5 case ever to come before this Court with the Government as a party, and the Government has yet to justify the procedures it uses in making Section 5 decisions (J.S. 15), except to say that Congress intended it that way (U.S. Br. pp. 38-42).

The question is not only did Congress so intend, but also, if that intent was accomplished, is it constitutionally valid, and has the Justice Department acted as Congress provided, or has it acted outside the scope of its valid powers? Did Congress provide in Section 5 (and would it be valid if it had): "If the Attorney General is unable to conclude that the change does not have a discriminatory racial effect on voting, he shall disapprove the change"?

That is what happened here (A. 10-11). That is one of the questions presented by this appeal.

Amici have argued that Georgia has abandoned the third question (Amici Br. pp. 42-43). The Government, whose lawyers were present in court, has not made any such argument. At the hearing in the District Court,

Judge Bell asked counsel for the Government (A. 53): "What evidence is there of discrimination in the reapportionment plans?" The Court was treating the Government's complaint in this case as it would any other reapportionment case, without recognizing that *Allen* and *Perkins* held that the inquiry should be "limited to the determination whether 'a state requirement is covered by §5, but has not been subjected to the required federal scrutiny.'" *Perkins*, 400 U.S. 379 at 383, citing *Allen*, 393 U.S. 544 at 561. Government counsel responded to Judge Bell's request for evidence of discrimination (A. 54):

> " It is our position, Your Honor, that the United States does not have to prove discrimination. I think the Supreme Court has made that quite clear in the *Allen* and *Perkins* decisions. However, if your Honor wishes, Mr. Piper can pinpoint some of the grounds for our objection."

Counsel for the State then agreed (A. 54):

> "I do not want to give up any rights of our clients, but neither do I want to lead the Court into error. It is my understanding of the law that the Justice Department is not required to prove discrimination."

After learning that this was not a typical reapportionment case, the Court took a 15 minute recess (A. 54).

After the recess, Mr. Piper, speaking for the Government, returned to the subject, saying (A. 55-56):

> "I might say a word here about the nature of this action and the relief we are seeking. We realize it is difficult for a Judge to grant relief in a case when he doesn't know the basis for the Attorney General's

finding of discrimination. I know it would be difficult for me if I were a Judge. But we have to live with Section 5 the way it was written by Congress, and the way it has been interpreted by the Supreme Court. This is not a Fifteenth Amendment lawsuit, and we are not here to prove discrimination. It is our contention that if you find in our favor on the four defenses which have been raised by the State, then neither of the House reapportionment plans which have been objected to by the Justice Department can be used by the State and they should be enjoined from doing so."

Amici now contend (Amici Br. pp. 42-43) that Georgia's agreement that the Government was not required to prove discrimination in this case before the District Court, constituted abandonment of Georgia's contention that the Attorney General acted *ultra vires* in putting the burden of proof on Georgia in the "proceeding" before the Justice Department. The location of the burden of proof in court (see *Allen* and *Perkins, supra*) is entirely different and distinct from the location of that burden upon the State in a "proceeding" before the Justice Department (see 28 C.F.R. 51.19; Ga. Br. p. 60). Agreeing once with the Government as to one thing does not mean you agree with the Government as to everything.

It is Georgia's position that the language of Section 5 shows that Congress intended that if the Attorney General did not find the submitted change to have a racially discriminatory purpose or effect, he should interpose no objection and the change would take effect, subject to being challenged in court. That is, we submit, how Section

5 reads and is what this Court had in mind when it said in *Allen*, 393 U.S. at 549:

> "The Attorney General does not act as a Court in approving or disapproving the state legislation."

Contrary to *Allen*, the Attorney General's regulations (promulgated without statutory authority) seek to establish the Civil Rights Division of the Justice Department as a court (28 C.F.R. 51.19; 28 C.F.R. 0.50), to place the burden of proof on the submitting State without notice of charges or opportunity to examine the material (28 C.F.R. 51.26a) on which the decision is based (28 C.F.R. 51.19), and to allow disapproval of State laws when the man in charge is unable to reach a decision (A. 10-11).

If these issues are to be decided in favor of the Government, then the administrative problems left unresolved in *Allen*, 393 U.S. at 569, can be resolved simply by the Government, but the covered States may as well abandon to the local District Courts the task of formulating reapportionment plans.

QUESTION 2.

Apparently we have been unable to make clear the fundamental basis of the second question presented. The Government's restatement of the second question indicates that we have not succeeded in getting attention directed to the main issue.[2]

To clarify our position, we will undertake to simplify the question. One undisputed fact is essential. Georgia has been using multi-member districts since 1880 (Ga. Const. 1877, Art. III, Sec. III, Par. I). Simply stated, the

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[2]Amici have omitted all discussion of question 2, except in footnote 12 (Amici Br. p. 14).

question is: Does Section 5 empower the Attorney General to disapprove Georgia's use of multi-member districts, *in toto?* That is what he did.

The Government has restated this question, as follows (U.S. Br. p. 2):

> "2. Whether the 1971 and 1972 Georgia House of Representatives reapportionment plans were election law 'changes' that required submission to the Attorney General under Section 5 of the Act."

That is not the question. Certainly the reapportionment plans were "changes", if reapportionment plans are subject to the Act. But that is the first question.

The question is: Can the Attorney General disapprove Georgia's use of multi-member districts, which he undertook to do, when Georgia has been using multi-member districts since 1880?

A District Court, upon finding one invalid multi-member district, is without authority to eliminate every multi-member district in the State. *Whitcomb v. Chavis,* 403 U.S. 124, 160-161 (1971). A District Court is without authority to find the use of multi-member districts to be invalid, *per se. Whitcomb, supra,* 403 U.S. at 142.

Can the Attorney General eliminate all 32 multi-member districts in Georgia on the basis of 15 to which he objects? Can he find that the use of multi-member districts is invalid *per se?* Can he, under the Voting Rights Act, disapprove their use when they have been in use since 1880?

The real issue the Court is being asked to decide is: When a change is submitted, can the Attorney General

disapprove only the "change", or can he disapprove other parts of the law as well? As candidly stated to the court below (Plaintiff's Brief to the District Court, R. 170, pp. 12-13):

> "The United States submits that the difference between the 1971-1972 plans and the 1964 plan only triggers the requirement for submission under Section 5 and does not necessarily limit the standards of review or the permissible range of objection resulting from such review."

When a reapportionment plan is submitted for a 180 member House, which is not a change in the number of legislative members, can the Attorney General disapprove the continued use of 180 members?

When House and Senate plans are submitted, could the Attorney General disapprove the use of the bicameral system in existence since the State was created?

Without being informed of it, this Court is being asked to hold, in effect, that the "change" only "triggers" the requirement of submission but that the Attorney General is not limited to objecting to the "change." If the Attorney General is not limited to disapproving the "change", what are his limits? The scope of the Attorney General's power silently being asserted is awesome.

Georgia has a majority vote requirement. That is, a candidate must receive a majority of the vote to be elected. If no candidate receives a majority, there is a run-off election, 21 days later, between the two candidates receiving the highest number of votes. Ga. Code §34-1513. Georgia's majority vote, run-off requirement is

valid. *Bond v. Fortson*, 334 F.Supp. 1192 (N.D. Ga. 1971), aff'd., 404 U.S. 930 (1971).

That requirement is not, however, applicable to election of presidential electors. If Georgia were to change the run-off date from 21 to 28 days, or if Georgia were to change the application of the requirement so as to exempt not only presidential electors but also Congressmen, could the Attorney General disapprove Georgia's use of majority vote *per se* because the law had changed? We respectfully submit that the Attorney General's power under Section 5 is limited to disapproving that which has changed. In any event, we feel the Court will now know what power it is being asked to bestow on the Attorney General.

QUESTION 1.

The first and foremost question presented is: Is Section 5 of the Voting Rights Act applicable to State legislative reapportionment acts, and if so, is it constitutional as thus applied?

We apologize for reversing the sequence of the questions presented, but the administrative problems and the Federal/State conflicts are more readily recognized after the Government's administration of Section 5 has been reviewed.

The Government and amici have argued that *Allen* decided that Section 5 is applicable to reapportionment. Neither the Government nor amici's counsel who participated in *Allen/Fairley* has explained the Government's restrictive position before this Court in those cases (see Ga. Br. pp. 17-20). Now counsel says (Amici Br. p. 26) that the *Fairley* practices are indistinguishable, whereas

in the Government's *Fairley* Brief counsel said that *Fairley* does not fit into the ordinary pattern of apportionment litigation (Ga. Br. pp. 18-19).

The Government and amici have argued that Congress adopted *Allen* when it passed the Voting Rights Amendments of 1970. In *Allen*, this Court expressly refused to decide whether Section 5 is applicable to reapportionment legislation (393 U.S. at 569). Congress did not adopt from *Allen* that which the Court did not decide in *Allen*. If Congress adopted *Allen*, it too left undecided this very question.

Amici say that Georgia does not point to even one crisp statement by the draftsmen of the Voting Rights Act that reapportionment acts are not within the coverage of Section 5 (Amici Br. pp. 29-30). Georgia pointed to the statement of Mr. David L. Norman, a draftsman of the 1965 Act, testifying on behalf of the Attorney General, the administration and the Civil Rights Division of the Justice Department, before a Congressional committee, that prior to *Allen* and *Perkins:*

> "We didn't formerly think that reapportionment as such had to be submitted, or annexation." (Ga. Br. pp. 21-22).

We believe Mr. Norman's statement to be crisp enough. If the Court is expected, in construing a statute, to defer to the interpretation of it by the federal administrator (Amici Br. pp. 56-57), Mr. Norman's statement is entitled to great weight.

In addition, it is interesting to note that the Justice Department's statistics on reapportionment submissions all begin in 1969 (U.S. Br. pp. 25-26, fn. 18, fn. 19), the

year *Allen* was decided. We suggest it to be a fact that there are no such statistics for the years 1965 through 1968. The 1960's have been called the reapportionment decade. Yet not once from 1965 to 1969 did the Justice Department or anyone else in this country assert that reapportionment acts were subject to Section 5.

Amici's counsel, first assistant to the Assistant Attorney General in charge of the Civil Rights Division from April 12, 1965 to January 31, 1967, and then the Assistant Attorney General in charge of the Civil Rights Division from January 3, 1968 to January 20, 1969, took no action to apply Section 5 to reapportionment during his 34 month tenure in office. His inaction is also entitled to some weight.

Moreover, amici's argument now makes it appear that the District Courts in seven states considering reapportionment acts adopted after November 1, 1964, should have required such acts to be submitted first to the Attorney General, before accepting jurisdiction and considering those acts on their merits. In fact, it would now appear (from amici's argument) that this Court should not have affirmed in *Toombs v. Fortson*, 384 U.S. 210 (1966), but should have reversed, directing the District Court to require Georgia to submit its 1965 House reapportionment plan to the Justice Department.

The truth of the matter is that nobody, neither Judges nor federal officials, ever thought that reapportionment plans were subject to Section 5 until *Allen*, and *Allen* expressly did not decide the question (393 U.S. at 569).

What happens if Section 5 is made applicable to reapportionment? Legally, Section 5 immediately becomes

applicable to congressional redistricting acts, as well as State legislative reapportionment acts. Then the reapportionment and redistricting acts of the seven covered States must be approved in Washington. Moreover, the reapportionment and redistricting acts of the other affected States, those which have political subdivisions subject to the Act, Arizona, California, Hawaii, Idaho, New York and Wyoming, or at least those portions of their reapportionment and redistricting acts as relate to the covered political subdivisions, must also be approved in Washington.[8]

Then, as a practical consequence, although a covered State could submit its reapportionment plans to either the Attorney General or the District Court for the District of Columbia for approval, it is far more likely to abandon attempts at reapportionment and shift the reapportionment problem to the local District Court in the first instance. Why? First, because self-reapportionment is a bitter legislative battle in any event, pitting legislative neighbor against neighbor.

Secondly, the Attorney General (or District Court for the District of Columbia) can only consider 15th Amendment aspects of reapportionment. The local District Court can consider both 14th and 15th Amendment aspects but will not consider any 15th Amendment questions until after the Attorney General's review is completed (U.S. Br. p. 27, fn. 22).

To avoid the legislative battle, followed by executive delay and indecision, followed by judicial delay and then

[8]At this writing, we have been unable to ascertain whether or not the Justice Department is requiring Arizona, California, Hawaii, Idaho, New York and Wyoming to submit their reapportionment and redistricting acts for approval.

confrontation, the legislatures of the covered States could conclude that one judicial proceeding like *Connor v. Johnson*, 402 U.S. 690 (1971), will expedite and simplify the procedure.

It makes no sense to submit reapportionment plans to the Attorney General when the District Court most familiar with the problems is better equipped to handle them. The Attorney General cannot formulate a reapportionment plan, the District Court can. The Attorney General cannot withhold relief when an election is imminent, the District Court can.

We do not find in either the Government's brief or the amici brief any suggestion that the District Courts are less capable than the Attorney General of reviewing reapportionment plans. One review, by a court of competent jurisdiction, is enough. There is no need to involve the U. S. Attorney General in approving or disapproving reapportionment and redistricting plans. To do so is to extend *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), to include the Executive Branch, and place in the hands of the Attorney General the power to veto congressional redistricting acts. The fears of Mr. Justice Black, dissenting in *Allen* and *Perkins, supra*, are particularly applicable in the case at bar.

CONCLUSION

Let us summarize this case. The Government contends that the validity of Section 5 was upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). At that time, no state law had been submitted, but the Court undoubtedly had in mind state *voting* laws (383 U.S. at 315-316, 319-320, 323).

In *Allen, supra*, it was held that Section 5 is applicable to certain *election* laws (393 U.S. at 549, 566). The Court did not in *Allen* decide whether Section 5 is applicable to reapportionment (393 U.S. at 569) and did not consider the constitutional validity of Section 5 if applied to reapportionment.

Now the Court is being asked to apply *Katzenbach* and *Allen* to reapportionment. Step by step we have come, and where are we?

The Government is asking this Court to hold that the legislative reapportionment and congressional redistricting acts of the covered and affected States cannot go into effect until federal approval is obtained. We submit that that is not "appropriate legislation" authorized by Section 2 of the 15th Amendment.

To accomplish its goal, the Government asks this Court also to hold that the Attorney General can enact regulations without statutory authority, which regulations amend the law of Congress, to uphold the Attorney General's veto of a State law as to which he was unable to reach a conclusion, and to uphold the Attorney General's veto (contrary to *Whitcomb v. Chavis, supra*) of Georgia's historic use of multi-member districts.

We respectfully submit that the decision and order of the District Court should be reversed.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GEORGIA ET AL. *v.* UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 72-75. Argued February 12, 1973—Decided May 7, 1973

On November 5, 1971, the State of Georgia submitted to the Attorney General for consideration under § 5 of the Voting Rights Act its 1971 House reapportionment plan. Two weeks later, the Attorney General requested additional information, which was received on January 6, 1972. On March 3, the Attorney General, after citing the combination, *inter alia*, of multimember districts, majority runoff elections, and numbered posts, objected to the plan, being unable to conclude that it did not have a discriminatory racial effect on voting. The state legislature then enacted its superseding 1972 plan, which was submitted on March 15 and rejected by the Attorney General on March 24 as not overcoming previous objections. The United States brought this suit to enjoin the holding of elections under the 1972 plan after the legislature decided against a new reapportionment. A three-judge District Court held that the 1972 plan came under § 5 of the Act and issued an injunction. *Held:*

1. Georgia's 1972 reapportionment changes, which have the potential for diluting Negro voting power, are "standards, practices, or procedures with respect to voting" within the meaning of § 5 of the Voting Rights Act, cf. *Allen* v. *State Board of Elections*, 393 U. S. 544. Pp. 5-9.

2. The Attorney General, applying a permissible regulation, placed the burden on Georgia as the submitting party to prove that the plan did not have a racially discriminatory purpose or effect on voting, and the State failed to meet that burden. Pp. 9-12.

3. Georgia's claim that the Attorney General did not seasonably object to the 1971 plan may well be moot in view of his timely objection to the superseding 1972 plan, but in any event that claim lacks merit as the Attorney General's regulation that the statutory

60-day period begins to run from the time that necessary information is furnished is reasonable and comports with the Act. Pp. 12–14.

4. Elections having been conducted under the 1972 plan under this Court's stay order, new elections are not required, but future elections under that plan will be enjoined until a plan withstanding § 5 clearance procedures is submitted. Pp. 14–15.

Affirmed and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the result. WHITE, J., filed a dissenting opinion in which POWELL and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-75

Georgia et al., Appellants, v. United States. } On Appeal from the United States District Court for the Northern District of Georgia.

[May 7, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Attorney General of the United States brought this suit under § 12 (d) of the Voting Rights Act as amended, 42 U. S. C. § 1973j (d), to enjoin the State of Georgia from conducting elections for its House of Representatives under the 1972 legislative reapportionment law. A three-judge federal court in the Northern District of Georgia agreed that certain aspects of the reapportionment law came within the ambit of § 5 of the Act, 42 U. S. C. § 1973c, and that the State, which is subject to the provisions of § 5,[1] had not obtained prior clearance from either the Attorney General or the District Court for the District of Columbia. Accordingly, and without reaching the question whether the reapportionment plan had the purpose or effect of "denying or abridging the right to vote on account of race or color,"

[1] A State is subject to § 5 if it qualifies under § 4 (b), 42 U. S. C. § 1973b (b). Covered States are those which on November 1, 1964, employed any of several enumerated tests or devices as a prerequisite to voting, and in which less than 50% of eligible voters were registered to vote or actually voted in the November 1964 presidential election. States that meet identical criteria with respect to the 1968 presidential election are also covered under the amended Act. It is stipulated that Georgia is covered under § 4 (b).

42 U. S. C. § 1973c, the District Court issued the requested injunction.[1] The State brought this appeal. We noted probable jurisdiction, staying enforcement of the District Court judgment pending disposition of the appeal. 409 U. S. 911.

Following the 1970 Census, the Georgia Legislature set out to reapportion its State House of Representatives, State Senate, and federal congressional electoral districts. We are here concerned only with the reapportionment plan for the State House of Representatives.[2] The result of the Legislature's deliberations was a plan (hereinafter the 1971 plan) that, as compared with the prior 1968 scheme, decreased the number of districts from 118 to 105, and increased the number of multi-member districts from 47 to 49. Whereas the prior apportionment plan had generally preserved county lines, the 1971 plan did not: 31 of the 49 multi-member districts and 21 of the 56 single-member districts irregularly crossed county boundaries. The boundaries of nearly all districts were changed, and in many instances the number of representatives per district was altered. Residents of some 31 counties formerly in single-member districts were brought into multi-member districts. Under continuing Georgia law, a candidate receiving less than a majority of the votes cast for a position was required to participate in a majority runoff election. Ga. Code § 34–1513. And in the multi-member districts, each candidate was required to designate the seat for which he was running, referred to as the "numbered post." Ga. Code § 34–1015.

Section 5 of the Voting Rights Act forbids States subject to the Act from implementing any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without

[1] The decision of the District Court is unreported.

[2] No objection was interposed with respect to the State Senate or federal congressional districts.

first obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," *or* submitting the plan to the Attorney General of the United States and receiving no objection within 60 days. 42 U. S. C. § 1973c. Pursuant to this requirement, the State of Georgia submitted the 1971 plan to the Attorney General on November 5, 1971. Two weeks later, a representative of the Department of Justice wrote to the State Attorney General, requesting further information needed to assess the racial impact of the tendered plan.[4] This information was received on January 6, 1972, and on March 3, 1972, the Attorney General of the United States formally objected to the State's plan. The objection letter cited the combination of multi-member districts, numbered posts, majority run-off elections, and the extensive departure from the State's prior policy of adhering to county lines. On the basis of these changes plus particular changes in the structure of potential black majority single-member districts, the Attorney General was "unable to conclude that the plan does not have a discriminatory racial effect on voting." The letter stated that the Attorney General therefore felt obligated to "interpose an objection to changes submitted by the reapportionment plans."

The State Legislature immediately enacted a new reapportionment plan and repealed its predecessor. The 1972 plan increased the number of districts from 105 to 128, and decreased the number of multi-member districts

[4] The Justice Department asked for census maps of the 1964 and 1968 House districts; the distribution of white and nonwhite population within the 1964, 1968, and 1971 districts; a history of the primary and general elections in which Negro candidates ran; data, including race, with respect to all elected state representatives; and the legislative history of all redistricting bills.

from 49 to 82. Twenty-two of the multi-member districts and 37 of the single-member districts still crossed county boundaries.

This 1972 plan was submitted to the Attorney General on March 15, and he objected on March 24. The Assistant Attorney General's letter stated, in part:

> "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972 letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972 letter I must, on behalf of the Attorney General, object to S. B. 690 reapportioning the Georgia House of Representatives."

When the Georgia Legislature resolved that it would take no further steps to enact a new plan, the Attorney General brought the present lawsuit.

The State of Georgia claims that § 5 is inapplicable to the 1972 House plan, both because the Act does not reach "reapportionment" and because the 1972 plan does not constitute a change from procedures "in force or effect on November 1, 1964." If applicable, the Act is claimed to be unconstitutional as applied. The State also challenges two aspects of the Attorney General's conduct of the § 5 objection procedure, claiming first that the Attorney General cannot object to a state plan without finding that it in fact has a discriminatory purpose or effect, and second that the Attorney General's objection to the 1971 plan was not made within the 60-day time period allowed for objection under the Act.

I

Despite the fact that multi-member districts, numbered posts, and a majority runoff requirement were features of Georgia election law prior to November 1, 1964, the changes that followed from the 1972 reapportionment are plainly sufficient to invoke § 5 if that section of the Act reaches the substance of those changes. Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters. It seems clear that the extensive reorganization of voting districts and the creation of multi-member districts in place of single-member districts in certain areas amounted to substantial departures from the electoral state of things under previous law. The real question is whether the substance of these changes undertaken as part of the state reapportionment are "standards, practices, or procedures with respect to voting" within the meaning of § 5.

The prior decisions of this Court compel the conclusion that changes of the sort included in Georgia's 1972 House reapportionment plan are cognizable under § 5. In *South Carolina* v. *Katzenbach*, 383 U. S. 301, we upheld the basic constitutionality of the Voting Rights Act. Mr. Justice Black dissented from that judgment, precisely describing the broad sweep of § 5:

"Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color." 383 U. S., at 356 (concurring and dissenting opinion).

The applicability of § 5 to election law changes such as those enacted by Georgia in its 1972 plan was all but conclusively established by the opinion of this Court in *Allen* v. *State Board of Elections*, 393 U. S. 544. The *Allen* opinion, dealing with four companion cases, held that § 5 applied to a broad range of voting law changes, and was constitutional as applied. With respect to the reach of § 5, we held that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Id.*, at 566. One of the companion cases, *Fairley* v. *Patterson*, involved a claim that a change from district to at-large voting for county supervisor was a change in a "standard, practice or procedure with respect to voting." The challenged procedure was held to be covered by § 5. We noted that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964)." *Id.*, at 569. In holding that § 5 reached voting law changes that threatened to dilute Negro voting power, and in citing *Reynolds* v. *Sims*, we implicitly recognized the applicability of § 5 to similar but more sweeping election law changes arising from the reapportionment of state legislatures. 393 U. S., at 565–566, 582–586 (Harlan, J., concurring and dissenting).

Had Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed,[8] the Act was extended for five years,

[8] See, *e. g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 4249, H. R. 5338, and Similar Proposals, 91st Cong., 1st Sess., at 1, 4, 18, 83, 130–131, 133, 147–149, 154–155, 182–184, 403–454; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary

without any substantive modification of § 5. Pub. L. 91-285, 84 Stat. 314, 315 (1970). We can only conclude, then, that *Allen* correctly interpreted the congressional design when it held that "the Act gives a broad interpretation to the right to vote, recognising that voting includes 'all action necessary to make a vote effective.'" 393 U. S., at 565–566.

Another measure of the decisiveness with which *Allen* controls the present case is the actual practice of covered States since the *Allen* case was decided. Georgia, for example, submitted its 1971 plan to the Attorney General because it clearly believed that plan was covered by § 5. Its submission was "made pursuant to § 5," and the State Attorney General explained in his submission that the 1968 reapportionment of the Georgia House of Representatives "was not submitted because at that time, prior to *Allen* v. *Board of Elections*, . . . it was believed to be unnecessary to submit reapportionment plans to the United States Attorney General pursuant to the Voting Rights Act of 1965." When the Attorney General objected, Georgia changed its House plan and resubmitted it pursuant to § 5. Other States covered by the Act have also read *Allen* as controlling. The brief for the United States advises us that as of December 1, 1972, 381 post-*Allen* reapportionment plans had been presented to the Attorney General by various States for § 5 approval.

In the present posture of this case, the question is not whether the redistricting of the Georgia House, including extensive shifts from single- to multi-member districts,

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on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., at 48, 195–196, 369–370, 397–398, 426–427, 469. David L. Norman, then Deputy Assistant Attorney General, Civil Rights Division, testified that, "from court decisions, all these redistricting plans are going to have to be submitted to the Attorney General for his approval because they are voting changes." Senate Hearings, *supra*, at 507.

in fact had a racially discriminatory purpose or effect. The question, rather, is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5. It is beyond doubt that such a potential exists, cf. *Whitcomb* v. *Chavis*, 403 U. S. 124, 141–144. In view of the teaching of *Allen*,* reaffirmed in *Perkins* v. *Matthews*, 400 U. S.

*The appellant points to language in the *Allen* opinion that, it says, left open the question of the applicability of § 5 to a state reapportionment law. The cited passage in *Allen* is as follows:

"Appellees in No. 25 [*Fairley* v. *Patterson*] also argue that § 5 was not intended to apply to a change from district to at-large voting, because application of § 5 would cause a conflict in the administration of reapportionment legislation. They contend that under such a literal reading of § 5, enforcement of a reapportionment plan could be enjoined for failure to meet the § 5 approval requirements, even though the plan had been approved by a federal court. Appellees urge that Congress could not have intended to force the States to submit a reapportionment plan to two different courts.

"We must reject a narrow construction that appellees would give to § 5 . . . . The argument that some administrative problem might arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict." 393 U. S., at 564–565, 569.

The caveat implicit in this language would support the appellant's position only if practical problems of administration had emerged in the period that has elapsed since *Allen* was decided. This does not appear to have been the case. The brief of the United States advises us that the Department of Justice has adopted procedures designed to minimize any conflicts between § 5 administrative review and federal court litigation based on Fourteenth or Fifteenth Amendment attacks upon state reapportionment plans. Where a reapportionment plan has been prescribed by federal judicial decree, the Attorney General does not review it. See *Conner* v. *Johnson*, 402 U. S. 690, 691. Where a plan has been submitted to the Attorney General and is at the same time being litigated with respect to a Fifteenth Amendment claim, the Attorney General has deferred to the judicial determination regarding racial discrimination. Finally, the number of instances presenting an administrative-judicial overlap has been small. Of the 881 reapportionments submitted to the At-

379, we hold that the District Court was correct in deciding that the changes enacted in the 1972 reapportionment plan for the Georgia House of Representatives were within the ambit of § 5 of the Voting Rights Act.[1] And for the reasons stated at length in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–337, we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment.

II

By way of implementing the performance of his obligation to pass on state submissions under § 5, the Attorney General has promulgated and published in the Federal Register certain administrative regulations, 28 CFR § 51. The appellant claims these regulations are without legislative authorization, and objects in particular to the application in the present case of two regulations which set forth the standards for decision on submissions and more fully define the 60-day time period provided in the Act.

It is true, as the appellant contends, that § 5 itself does not authorize the Attorney General to promulgate any regulations. But § 5 is also silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standards governing the contents of those submissions, and as to

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torney General, only 19 of the objected-to submissions were involved in litigation when submitted.

[1] Georgia has argued that § 5 approval is needed only with respect to those electoral districts in which a change in a "standard, practice, or procedure with respect to voting" occurred. In an appropriate case a State might establish that a reapportionment plan left some districts unaffected by even a minor change with the potential for diluting the value of the Negro vote. We do not decide whether Georgia could show the existence of any unaffected districts in this case, and we leave that issue for consideration by the District Court on remand.

the meaning of the 60-day time period in which the Attorney General is to object, if at all. Rather than reading the statute to grant him unfettered discretion as to procedures, standards, and administration in this sensitive area, the Attorney General has chosen instead to formulate and publish objective general rules. If these regulations are reasonable and do not conflict with the Voting Rights Act itself, then 5 U. S. C. § 301, which gives to "[t]he head of an Executive department" the power to "prescribe regulations for the government of his department, . . . [and] the distribution and performance of its business . . . ," is surely ample legislative authority for the regulations. See *United States* v. *Morehead*, 243 U. S. 607; *Smith* v. *United States*, 170 U. S. 372.

In 28 CFR § 51.19, the Attorney General has set forth the standards to be employed in deciding whether or not to object to a state submission. The regulation states that the burden of proof is on the submitting party, and that the Attorney General will refrain from objecting only if his review of the material submitted satisfies him that the proposed change does not have a racially discriminatory purpose or effect. If he is persuaded to the contrary, or if he cannot within the 60-day time period satisfy himself that the change is without a discriminatory purpose or effect, the regulation states that the Attorney General will object to the submission.[8] In

[8] 28 CFR § 51.19, in pertinent part, states that: ". . . the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. . . . If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall,

objecting to the 1971 plan, the Assistant Attorney General wrote that he was "unable to conclude that the plan does not have a discriminatory racial effect on voting." The objection letter to the 1972 plan did not specify a degree of certainty as to the plan's discriminatory impact, but instead stated that the new plan had not remedied the features found objectionable in its predecessor.

Although both objections were consistent with the Attorney General's regulations, the appellant in effect attacks the legitimacy of the regulation described above in contending that the Attorney General is without power to object unless he has actually found that the changes contained in a submission have a discriminatory purpose or effect.

In assessing this claim, it is important to focus on the entire scheme of § 5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Board of Elections, supra*, at 549.

It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof.[9] What the Attorney General's regulations do is

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consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

[9] The very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting. Rather than requiring affected parties to bring suit to challenge every changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect. The burden of proof is on "the areas seeking relief." *South Carolina v. Katzenbach*, 383 U. S. 301, 335.

to place the same burden on the submitting party in a § 5 objection procedure. Though the choice of language in the objection letter sent to the State of Georgia was not a model of precision, in the context of the promulgated regulations the letter surely notified the State with sufficient clarity that it had not sustained its burden of proving that the proposed changes were free of a racially discriminatory effect. It is not necessary to hold that this allocation of the burden of proof by the Attorney General was his only possible choice under the Act, in order to find it a reasonable means of administering his § 5 obligation. Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance. The Attorney General's choice of a proof standard was thus at least reasonable and consistent with the Act, and we hold that his objection pursuant to that standard was lawful and effective.

The appellant's final contention is that the Attorney General's objection to the 1971 plan was untimely, and so the submitted plan should have been held by the District Court to have gone into effect. It is far from clear that this claim is not simply moot, since the state enactment establishing the 1972 plan explicitly repealed the 1971 plan,[10] and the objection to the 1972 plan was clearly within the statutory time period. In any event, the claim is without merit.

In promulgating regulations, the Attorney General dealt with several aspects of the 60-day time limit established by § 5 of the Act. The regulations provide that all calendar days count as part of the allotted period, that parties whose submissions are objected to may seek reconsideration on the basis of new information and obtain a ruling within 60 days of that request, and that

[10] See Ga. Senate Bill 690, March 9, 1972.

the 60-day period shall commence from the time the Department of Justice receives a submission satisfying the enumerated requirements. 28 CFR § 51.3 (c), (d), (b).

In the present case, the Attorney General found the initial submission of the 1971 plan incomplete under the regulations. Two weeks after receiving it, he requested additional information.[11] His letter referred to 28 CFR § 51.18, a regulation providing for a request for additional information, and noted the additional regulatory provision that the 60-day period would not commence until the information was received. The State did not submit the requested data until January 6, 1972. Under the above mentioned regulation the 60-day period commenced on that date, and the Department of Justice made its objection within 60 days—on March 3.

The appellant argues that the Attorney General has granted himself more time than the statute provides by

[11] The letter sent to the Attorney General of Georgia stated that a "preliminary examination" of the materials submitted led the Department of Justice to conclude "that the data sent to the Attorney General are insufficient to evaluate properly the changes you have submitted. In accordance with Sections 51.10 (a) (6) and 51.18 (a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 . . . would you please assist us by providing this Department the following additional information. . . ."

The promulgated regulations define in 28 CFR § 51.10 the contents of a submission. § 51.10 (a) (6) states:

"With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18 (a)."

Section 51.10 (b) "strongly urges" submitting authorities to produce the information enumerated to the extent it is available and relevant to the submitted changes. Virtually all of the information requested in this case, see n. 4, *supra*, falls within the enumerated categories of § 51.10 (b).

promulgating regulations suspending the time period until a complete submission is received. Here again, the question is whether the regulation is a reasonable administrative effectuation of § 5 of the Act. The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information. There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan.[18] Yet if the Attorney General were denied the power to suspend the 60-day period until a complete submission were tendered, his only plausible response to an inadequate or incomplete submission would be simply to object to it. He would then leave it to the State to submit adequate information if it wished to take advantage of this means of clearance under § 5. This result would only add acrimony to the administration of § 5. We conclude, therefore, that this facet of the Attorney General's regulations is wholly reasonable and consistent with the Act.

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[17] See n. 4, *supra*.

[18] The appellant contends that to allow the Attorney General to promulgate this regulation is to open the way to frivolous and repeated delays by the Justice Department of laws of vital concern to the covered States. No such conduct by the Attorney General is presented here, and by upholding the basic validity of the regulation we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown. Furthermore, a submission to the Attorney General is not the exclusive mode of preclearance under § 5. If a State finds the Attorney General's delays unreasonable, or if he objects to the submission, the State "may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia." *Allen* v. *State Board of Elections*, 393 U. S. 544, 549.

III

For the foregoing reasons, the judgment of the District Court is affirmed. Since, however, elections were conducted under the disputed 1972 plan by reason of this Court's stay order, it would be inequitable to require new elections at this time.

The case is remanded to the District Court with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State, pursuant to § 5 of the Voting Rights Act, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-75

Georgia et al., Appellants, v. United States. | On Appeal from the United States District Court for the Northern District of Georgia.

[May 7, 1973]

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result reached by the Court but I do so under the mandate of *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969). I have previously expressed my reservations as to the correctness of that holding. See *Perkins* v. *Matthews*, 400 U. S. 379, 397 (1971) (BLACKMUN, J., concurring).

SUPREME COURT OF THE UNITED STATES

No. 72-75

Georgia et al., Appellants, v. United States. | On Appeal from the United States District Court for the Northern District of Georgia.

[May 7, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

Section 5 of the Voting Rights Act of 1965 provides that a State may not put into effect any change in voting qualifications or voting standards, practices or procedures until it either procures a declaratory judgment from the United States District Court for the District of Columbia to the effect that the alteration does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or, submits the alteration to the Attorney General and an objection has not been interposed by that official during the ensuing 60 days. In this case, the Attorney General interposed an objection on March 24, 1972, to the March 9 reapportionment plan of the Georgia House of Representatives and shortly thereafter sued to enjoin the use of that plan on the ground that the State had obtained neither the approval of the Attorney General nor that of the District Court. The District Court held § 5 was applicable to changes in state apportionment plans and that the section prevented the March 9 reapportionment from going into effect.

I agree that in the light of our prior cases and congressional reenactment of § 5, that section must be held to reach state reapportionment statutes. Contrary to the Court, however, it is my view that the Attorney Gen-

eral did not interpose an objection contemplated by § 5 and that there was therefore no barrier to the March 9 reapportionment going into effect.

It is arguable from the sparse language of the Act, which merely says that the State's modification will go into effect unless the Attorney General enters an objection, that any objection whatsoever filed by that official will suffice to foreclose effectiveness of the new legislation and force the State into the District Court with the burden of proving that its law is not unconstitutional. I cannot believe, however, that Congress intended to visit upon the States the consequences of such uncontrolled discretion in the Attorney General. Surely, objections by the Attorney General would not be valid if that officer considered himself too busy to give attention to § 5 submissions and simply decided to object to all of them, to one out of 10 of them or to those filed by States with governors of a different political persuasion. Neither, I think, did Congress anticipate that the Attorney General could discharge his statutory duty by simply stating that he had not been persuaded that a proposed change in election procedures would not have the forbidden discriminatory effect. It is far more realistic and reasonable to assume that Congress expected the Attorney General to give his careful and good faith consideration to § 5 submissions and within 60 days after receiving all information he deemed necessary, to make up his mind as to whether the proposed change did or did not have a discriminatory purpose or effect, and if it did, to object thereto.

Although the constitutionality of § 5 has long since been upheld, *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), it remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect. It is even more serious to insist that it initiate litigation and carry the burden of

proof as to constitutionality simply because the State has employed a particular test or device and a sufficiently low percentage of its citizens has voted in its elections. And why should the State be forced to shoulder that burden where its proposed change is so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality? If he is to object, must he not himself conclude that the proposed change will have the forbidden purpose or effect? Given such a proper objection, the matter would take on a familiar adversary cast; and there would then appear to be solid basis—at least the probable cause that a federal charge usually imports—for insisting on judicial clearance. Moreover, the issues between the State and the United States, as well as the litigative burden the State would have to bear, could be known and examined and intelligent decision made as to whether to institute suit in the District Court. As it is, the State may be left more or less at sea; for the Attorney General need merely announce that he is not at all convinced that the law submitted to him is not discriminatory.

My ideas as to the obligation of the Department of Justice with respect to a submission under § 5 is similar to what Congress itself has provided in § 4, 42 U. S. C. § 1973b (a). Under that provision, a State otherwise covered by the Act can terminate coverage as to it by securing a declaratory judgment that no discriminatory test or device has been used during the past 10 years. In that litigation, the section goes on to provide, the Attorney General must consent to the entry of such a judgment if "he has no reason to believe" that a discriminatory test or device has been used during the 10 years preceding the filing of the action. Thus, in even the far more important context of determining whether a State is in any respect covered by the Act, the Attorney General, if he is to object to a decree favorable to the

State, must have reason to believe, and so state, that tests or devices with the prohibited effect have been employed in the past. Surely, where the issue is not termination, vel non, but the purpose and effect of a single statute, regulation or other modification of voting procedures, it is not untoward to insist that the Attorney General not object to the implementation of the change until and unless he has reason to believe that the amendment has the prohibited purpose or effect. He should not be able to object by simply saying that he cannot make up his mind or that the evidence is in equipoise.

SUPREME COURT OF THE UNITED STATES

No. 72-75

Georgia et al., Appellants,
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United States.

On Appeal from the United States District Court for the Northern District of Georgia.

[May 7, 1973]

MR. JUSTICE POWELL, dissenting.

For the reasons stated in his opinion, I agree with MR. JUSTICE WHITE that the Attorney General did not comply with § 5 of the Voting Rights Act, 42 U. S. C. § 1973c, and that therefore Georgia's reapportionment act should have been allowed to go into effect. It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for *advance* review.*

*As Mr. Justice Black stated, the power vested in federal officials under § 5 of the Act to veto state laws in advance of their effectiveness "distorts our constitutional structure of government." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 358 (1966) (dissenting opinion). A similar appraisal was made by Mr. Justice Harlan, who characterised § 5, as construed by the Court, as "a revolutionary innovation in American government." *Allen* v. *Board of Elections*, 393 U. S. 544, 585 (1969) (concurring in part and dissenting in part). I have no doubt as to the power of the Congress under the Fifteenth Amendment to enact appropriate legislation to assure that the rights of citizens to vote shall not be denied, abridged or infringed in any way "on account of race, color, or previous condition of servitude." Indeed, in my view there is more than a power to enact such legislation, there is a duty. My disagreement is with the unprecedented requirement of advance review of state or local legislative acts by federal authorities, rendered the more noxious by its selective application in only a few States.

As a minimum, assuming the constitutionality of the Act, the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding rather than an ambivalent one.